Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BISHOP COLLINS, et al.,

Petitioners,

vs.

GERALD THOMPSON, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert A. Stalker, Jr.
Counsel of Record for Petitioners
Evergreen Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-5933

aBCD Legal Printers, Seattle, Washington

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QUESTIONS PRESENTED

(1) Must a consent decree be vacated solely because there is no showing of ongoing constitutional violations at the prison which is the subject of the decree?

(2) Did the Ninth Circuit err when it refused to consider the consent decree language that governs the final disposition of the case and instead interpreted the decree to require that it be vacated once minimal constitutional standards had been achieved?

PARTIES TO THE PRECEDING BELOW

In addition to the parties named in the caption of this case, the appellants below were the class "consisting of all those prisoners currently confined at the Washington State Reformatory or who may be confined there in the future."[1]

Respondents are Washington State officials responsible for managing the Washington State Reformatory. Parties to the consent decree at issue were Gerald E. Thomas, Amos Reed and Donald Look. The successor officials currently holding the relevant offices are Chase Riveland, Secretary, Washington State Department of Corrections, and Kenneth DuCharme, Superintendent, Washington State Reformatory.

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[1] The named class representatives were: Bishop Collins, Mario Valdez, Gary Taylor, Billy Bell, Robert Halstien, Daniel Evans and Randy Reed.

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OPINIONS BELOW

The opinion of the Ninth Circuit for which review is sought is reproduced as Appendix A. The opinion is reported at 8 F.3d 657 (9th Cir. 1993). The Ninth Circuit opinion affirms the unreported decision of the district court, reproduced as Appendix B. That opinion rejects the recommendation of the Magistrate Judge, reproduced as Appendix C.

The District Court decision was preceded in this case by an unreported memorandum from the Ninth Circuit reproduced as Appendix D; 972 F.2d 1338 (9th Cir. 1992) (table). Earlier the Court of Appeals had issued an unpublished order of limited remand (Appendix F) and an amended order of limited remand (Appendix G) with respect to that appeal. The district court's order on limited remand is reproduced as Appendix E. This appeal was taken from an unreported

district court order (Appendix H) approving the recommendation of the Magistrate Judge, reproduced as Appendix I.

The Ninth Circuit denied the petitioners' petition for rehearing and suggestion for rehearing en banc in an order reproduced as Appendix J.

JURISDICTION

The Ninth Circuit decision for which review is sought was issued on October 25, 1993. Rehearing was denied on January 6, 1994. This Court has jurisdiction to review the judgment below under 28 U.S.C. §1254(1).

RULE INVOLVED IN CASE

This case involves Federal Rule of Civil Procedure 60(b) which in relevant part provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following

> reasons:. .(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. . .

The case also involves construction of a consent decree between the parties; the decree is reproduced in Appendix K.

STATEMENT OF THE CASE

In 1978 the prisoners housed in the Washington State Reformatory (WSR) brought this class action suit against the administrators of the prison claiming eighth amendment violations. Federal court jurisdiction existed under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(a)(3) and 1343 (a)(4). At the time the suit was filed, the inmate population at WSR far exceeded the design capacity of the prison. WSR, until the resolution of the suit, was beset by riots, murders, assaults and suicides. In 1981, shortly before trial, the parties settled the

case, agreeing to a consent decree that required a gradual reduction of the WSR population to its design capacity of 656, the number of 54 to 60 square foot cells available for the general population.[2] App. K.

Although the parties agreed to reach the 656 limit by July, 1983, it was not until 1987 that single celling occurred at WSR. In the interim, the state (1) unsuccessfully appealed entry of the decree, Collins v. Thompson, 679 F.2d 168 (9th Cir. 1982); (2) sought stays of the population reduction; and (3) obtained a temporary modification of the decree in

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[2] The consent decree also established a process for studying and negotiating improvements to the food service and health care screening systems at the prison. The prisoners retained the ability to test the adequacy of any changes in the food and health areas under eighth amendment standards. By contrast, the population reduction was a substantive agreement that could stand alone.

1983 in order to house 910 prisoners at WSR for one year.

The parties agreed in the consent decree that after the population reduction had been completed, "a final judgment" would enter, "incorporating the terms" of the decree. App. at K-3. The prisoners' attorney later explained that the intent was "to secure an order which would permanently bar double-celling at the WSR." CR 771, Exhibit B at 2.

When the state finally met the population reduction obligations in 1987, however, no final judgment was entered. In 1988 the prisoners learned that the state intended to close almost half the WSR cells for a remodeling project that was to last about three years. The prisoners moved to temporarily reduce the population during the renovations in order to maintain the single cell occupancy implicitly required by the decree. The

prisoners' motion was granted and the state appealed.

While its appeal was pending, the state brought its first motion to dissolve the decree. The state claimed that it was in compliance with the population cap and the Constitution and argued that the decree could therefore be vacated under Article IV of the decree. The district court denied the motion, finding that it had no jurisdiction because the appeal was still pending.

The state then dismissed its appeal of the temporary modification and filed its second motion to vacate. This motion was based primarily on the argument that the population cap violated the eleventh amendment to the Constitution. In November, 1990, the district court denied the motion and the state again appealed. App. H, I.

After argument, the Ninth Circuit panel issued an Order of Limited Remand, requiring the district court to enter

> findings of fact and conclusions of law on the following matters:
>
> (1) Whether the consent decree has been "fully consummated" within the terms of Article II thereof. . .
>
> (2) Whether any violations of the Eighth Amendment to the Constitution of the United States currently exist at the Washington State Reformatory, and, if so, the remedial measures necessary to correct such violations.
>
> (3) Whether a final judgment should now be entered, and if not, why not; if a final judgment should now be entered, what the language of that judgment will be, including whether it should include a permanent injunction capping prisoner population at the Washington State Reformatory, specifically considering the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991).

App. at F-1 - F-2. On the prisoners' motion, the court later amended its order to delete the requirement that the district court evaluate the constitutionality of all conditions at the prison. App. G.

On remand, the district court did not enter a final order. It found that such an order would be premature in light of the still ongoing remodeling project. App. at E-6. In August, 1992, the same Ninth Circuit panel, in an unpublished order, vacated the November, 1990 order and directed the district court to enter a final judgment as contemplated by the decree. 972 F.2d 1338 (9th Cir. 1992) (mem.) App. D. The panel suggested that further judicial oversight of WSR was appropriate only "to preserve constitutional rights." App. at D-8.

The state immediately filed its third motion to vacate the decree under Fed. R. Civ. P. 60(b)(5) and "the provisions of Part II of the Consent Decree itself." CR 783. The Magistrate Judge who had presided over this case since its inception recommended that the final judgment should include a population cap.

App. C. He found the state's proposed interpretation of the decree to be "ludicrous" in that it would have permitted the state to double the WSR population the day after it met the population reduction goals of the decree. App. at C-3. The Magistrate Judge interpreted the decree to require a permanent injunction prohibiting the state from increasing the WSR population above the 656 person limit established in the decree. Id. at C-11.

The district court rejected the Magistrate Judge's recommendation and interpreted the Ninth Circuit panel's memorandum, together with its earlier orders, to require entry of a final judgment vacating the decree since "there are no present violations of

constitutional rights."[3] App. at B-5. The prisoners appealed. The same Ninth Circuit panel that heard the previous appeal affirmed the district court. Collins v. Thompson, 8 F.3d 657 (9th Cir. 1993). App. A. Again the panel emphasized the purported absence of "ongoing constitutional violations" as the basis for its holding. On January 6, 1994, the panel denied rehearing and the court rejected the suggestion of en banc review. App. J.

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[3] The district court never conducted any hearings regarding the existence of constitutional violations at WSR. When the prisoners sought discovery regarding conditions at the prison to prepare for the constitutional evaluation ordered by the Ninth Circuit in December, 1991, the district court granted the state's motion for protective order and denied the prisoners access to materials necessary for such an evaluation.

ARGUMENT

A. Courts May Not Condition the Continued Existence of a Consent Decree on the Requirement That Plaintiffs Continually Show Constitutional Violations at the Institution That Is the Subject of the Decree.

In its brief opinion, the Ninth Circuit, without analysis and with minimal references to controlling authority, has established a jurisprudentially unique position: It held that this consent decree must be dissolved in the absence of proven ongoing constitutional violations at WSR. Every other circuit that has considered whether the viability of a consent decree depends solely on findings of ongoing constitutional violations has rejected this conclusion.

The Ninth Circuit rule is wrong. It ignores this Court's holdings that consent decrees can (and usually do) require more of the parties than a court could order absent the settlement or than is required

by the Constitution. Rufo v. Inmates of Suffolk County Jail, ____ U.S. ____, 112 S.Ct. 748, 762-3 (1992); Suter v. Artist M., ____ U.S. ____, 112 S.Ct. 1360, 1365 n.6 (1992) ("As we have recognized previously this Term however, parties may agree to provisions in a consent decree which exceed the requirements of federal law." (citing Rufo)); Local No. 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 525 (1986) ("Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.")

Other circuits have rejected arguments similar to those the Ninth Circuit accepted. These arguments have arisen in a variety of contexts, including: enforcement proceedings,

motions to modify decrees that require more than the Constitution, motions to vacate decrees as void under the eleventh amendment, and, as here, motions to vacate or dissolve decrees under Rule 60(b)(5). While these various procedures are not identical, the analysis of the link between consent decree requirements and minimal constitutional requirements is the same in all. And, in all circuits save the Ninth Circuit in this aberrant case, courts have found prison consent decrees enforceable independent of constitutional requirements.

This Court has recognized that consent decrees are a common means of settling institutional reform litigation. Local No. 93 v City of Cleveland, 478 U.S. at 523 n.13. This Court should grant certiorari and reverse the courts below. It should reaffirm that a party's compliance with constitutional standards,

by itself, does not undermine the validity of a consent decree.

(1) The result in this case conflicts with that of the First Circuit in Inmates of Suffolk County Jail v. Rufo.

The case most similar in fact and posture to this, and the one that most clearly presents a conflict within the circuits, is Inmates of Suffolk County Jail v. Rufo, 12 F.3d 286 (1st Cir. 1993). (Hereafter "Suffolk County Jail"). In that case, the court rejected an argument from the Massachusetts Commissioner of Corrections that is almost precisely the same argument the Ninth Circuit accepted here: "According to the Commissioner, a district court that rules upon a motion to vacate an institutional reform consent decree must consider only whether the defendants are in present compliance with the constitutional requirements and whether the effects of the original violation have abated." 12 F.2d at 291.

Compare Collins, 8 F.3d at 658. ("Because the state has reduced inmate population and because there are no ongoing constitutional violations at the reformatory, we affirm the district court's order vacating the decree.")

The First Circuit rejected the Commissioner's proposed formula for vacating a consent decree. It found the Commissioner's standard too restrictive because it gives insufficient weight to the problem of recurrence. The Commissioner was unable to show that his plans for double-celling the Suffolk County Jail would not result in a recurrence of unconstitutional conditions. 12 F.3d at 294. The court was therefore concerned that "the constitutional conditions would be recreated soon after judicial oversight had been eliminated." Id.

This Court has not clearly established what test is to be used in considering motions to dissolve or vacate consent decrees. The First Circuit in Suffolk County Jail also did not decide what standard should be used since it determined the Commissioner could not meet the test established by Board of Education v. Dowell, 498 U.S. 237 (1991), the least demanding of potential standards. Dowell held that litigated school desegregation injunctions could be terminated if the constitutional wrong had been remedied and there was sufficient good faith compliance with the decree to satisfy the court that there is little likelihood of a repeat of the original constitutional violations. Since the Commissioner in Suffolk County Jail could not meet the second prong of the Dowell test, the First Circuit denied

his motion.[4] The First Circuit assumed that the Dowell standard for decree termination was "the one most favorable to the Commissioner that we can imagine being adopted by the Supreme Court." 12 F.3d at 293.

Although it failed to identify what legal test it applied, the Ninth Circuit approved vacating this decree based on a showing even less demanding than that established by Dowell. The courts below looked exclusively at current constitutional compliance and ignored

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[4] The First Circuit acknowledged that there were plausible arguments that Dowell should not apply in the context of a motion to vacate a jail consent decree, including: (1) School desegregation cases may be inherently different from other institutional reform cases; (2) Consent decrees should be treated differently from litigated decrees since the former embody an agreement between the parties; (3) Since parties can agree to do more than constitutionally required in a consent decree, compliance with the decree, not the Constitution, is the relevant consideration. 12 F.3d at 292-3.

completely the question of the possibility of future violations. The state did not claim and neither the Magistrate Judge, the District Court nor the Ninth Circuit found that the state would not exceed the population cap once the decree finally dissolved.[5] Instead the Ninth Circuit considered only whether there are current ongoing constitutional violations. Finding none, without more, the court affirmed dissolution of the decree. This Court should vacate the Ninth Circuit's holding and confirm that parties seeking relief from consent decrees must show more than temporary compliance with constitutional standards.

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[5] There is little question that the state will impose double celling on the WSR prisoners. Within days of the Ninth Circuit's 1992 memorandum vacating the earlier order denying the state relief. WSR staff issued a memorandum requesting volunteers for double celling. CR 789, Exhibit A.

(2) The Ninth Circuit's analysis of the relationship between consent decrees and constitutional compliance is inconsistent with all other circuits that have considered the question.

The result reached by the Ninth Circuit in this case is incompatible with the uniform holdings of other circuits that, once a consent decree has been entered, the obligations of the decree, not the Constitution, should concern the courts. This Court's statement in Local No. 93 v. City of Cleveland, 478 U.S. at 522, established the fundamental principle ignored by the Ninth Circuit: "More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." Those obligations do not somehow disappear merely because the parties claim they comply with the underlying law.

In affirming district court orders upholding and enforcing a prison population lid established by a consent decree, the District of Columbia Circuit stated that the District's "constitutional arguments were beside the point where the District had voluntarily avoided eighth amendment litigation by signing the consent decree." Twelve John Does v. District of Columbia, 861 F.2d 295, 301 (D.C. Cir. 1988), citing Twelve John Does v. District of Columbia, 855 F.2d 874, 878 n.30 (D.C. Cir. 1988) (In civil contempt action, the District argued that conditions at the prison did not implicate the Eighth Amendment. The Court rejected this defense, holding, "The requirements of the decree, not the Eighth Amendment, are the measure of the District's responsibilities.")

The Seventh Circuit recently reversed a district court's denial of a prisoner's

contempt motion for an alleged violation of a consent decree, holding:

> One reading [of the district court's order denying motion for contempt] suggests a belief that consent decrees, at least those stemming from constitutional grievances, cannot impose upon the parties rights and obligations greater than those required by the Constitution. This view quite simply is incorrect. Consent decrees often embody outcomes that reach beyond basic constitutional protections.

Kindred v. Duckworth, 9 F.3d 638, 641 (7th Cir. 1993).

The Second Circuit as well has recognized that once a consent decree is entered, constitutional compliance is no longer at issue:

> The [consent] judgment 'resolved' the constitutional issues only in the sense that most consent judgments resolve disputes: It obviated any need to determine whether the claims of constitutional violation were established by substituting for an adjudication of those claims a contractual agreement between the signatories enforceable as a judgment of the District Court upon the Court's approval of the agreement and entry of a judgment.

Badgley v. Varelas, 729 F.2d 894, 899 (2nd Cir. 1984).

Likewise, in an opinion quoted favorably by this Court in Rufo, the Fourth Circuit in a prison consent decree modification case, rejected the lower court's reasoning that "the only legally enforceable obligation assumed by the State under the consent decree was that of ultimately achieving minimal constitutional prison standards." Plyler v. Evatt, 924 F.2d 1321, 1327 (4th Cir. 1991) (emphasis in original). As this Court noted in Rufo, the argument that consent decrees must be modified when constitutional standards are clarified would undermine the finality of such agreements:

> Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make

> necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action.

112 S.Ct. at 763, quoting Plyler, 924 F.2d at 1327.

Similarly, the Tenth Circuit rejected a motion to vacate a prison consent decree based on New Mexico's argument that portions of the consent decree went beyond constitutionally based rights and thus violated the eleventh amendment. Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989), cert. denied, 493 U.S. 1056 (1990). The Duran court held that the district court "is not barred from entering a consent decree providing broader relief than the court might possibly have been empowered to enter after trial." Id. at 1491.

These cases are not consistent with the analysis or the result of the Ninth Circuit in this case. If a consent decree

that exceeds constitutional requirements can be entered and enforced, and if that decree is not subject to modification solely because it exceeds constitutional requirements, it makes no sense to hold, as did the Ninth Circuit, that the decree should be vacated if there is no showing of "ongoing constitutional violations." 8 F.3d at 659. The Ninth Circuit approach would force courts continually to assess constitutional compliance of parties to settlement agreements, even though the parties, as with those here, specifically avoided the constitutional evaluation when they settled the case. The Ninth Circuit rule undermines the validity of consent decrees and promises to increase the work for courts administering such decrees.

(3) Ninth Circuit case law governing the relationship between consent decrees and constitutional compliance is internally inconsistent.

Petitioners have uncovered only one case that supports the panel's opinion. Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983). The Penwell court affirmed modification of a prison consent decree when it found that prison officials had agreed to do more than constitutionally required. Since, the Penwell court held, portions of the consent decree were in excess of constitutional minima, they were unenforceable.[6] Penwell was, of course, decided before Rufo or Local No. 93 v. City of Cleveland. It is no longer good law and the court below did not cite it in its opinion in this case.

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[6] Not coincidentally, the author of the Washington v. Penwell opinion was also the author of the Ninth Circuit opinion in this case.

More recent Ninth Circuit case law, however, recognizes that, contrary to this case and Penwell, consent decrees are enforceable "even if no constitutional wrong exists." Stone v. City and County of San Francisco, 968 F.2d 850, 862 n.20 (9th Cir. 1992). The court in this case ignored Stone and the authority therein when it decided to the contrary.

(4) This case presents a real conflict between the circuits.

The Ninth Circuit does not explain what legal test it used to conclude that this decree must be vacated. As discussed below in part B, the panel was not interpreting the decree as written to reach its conclusion since the decree plainly requires a final judgment incorporating the population cap. The inescapable conclusion therefore is that

the panel was ruling on the state's Fed.R.Civ.P. 60(b)(5) motion.[7]

Because the Ninth Circuit does not clearly state that all consent decrees that require more than the Constitution does are subject to dissolution, the state may try to argue that petitioners are overstating the conflict in the circuits. The conflict, though, is apparent when one examines all the orders the panel below issued in this case, not simply the most recent opinion. Both the Ninth Circuit panel and the state in its arguments to that court continually emphasized the purported absence of constitutional violations at WSR as justification for vacating the decree. This emphasis shows

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[7] The district court as well did not identify what legal test it applied in vacating the decree. Rather than exercising its discretion under Rule 60(b), the district court appeared to interpret earlier Ninth Circuit orders to require termination of the case. App. at B-4 - B-7.

unmistakably that they improperly constructed a link between the viability of the decree and a showing of unconstitutional conditions.

In its 1991 appeal the state began its argument concerning the interpretation of the decree by criticizing the district court and Magistrate Judge for making "no finding...whether the conditions at WSR comport with Eighth Amendment standards." Brief at 11. The state next argued that enforcement of the decree, "absent an Eighth Amendment violation...is an abuse of the court's discretionary equitable powers." Id. at 24. The state's concluding argument, which was its principal argument before the district court, was that the court was "barred by the Eleventh Amendment from continued enforcement of a decree that goes beyond that which is necessary to remedy a constitutional violation." Id. at 28.

Thus, the state's entire appeal was premised on its incorrect claim that the decree should be vacated, or no longer enforced, if the prisoners did not show constitutional violations at WSR.

Inexplicably, in light of Rufo and Local No. 93 which clearly held that consent decrees could require more than the Constitution, the Ninth Circuit panel agreed with the state and opted to focus not on the language of the decree or the standards for modification but on the constitutionality of conditions at the prison. The panel issued an "order of limited remand" in which it required the district court to find "[w]hether any violations of the Eighth Amendment to the Constitution of the United States currently exist at the Washington State Reformatory..." App. at F-2. While this requirement was deleted in the panel's amended order after the prisoners

objected, the panel maintained the erroneous connection between the decree and constitutional compliance when it again ordered the district court to interpret the language of the decree, "specifically considering the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991)."[8] App. at G-3.

The panel presumably cited Toussaint for the proposition that jurisdiction in a prison case should end when there are no constitutional violations. Toussaint, however, has nothing to do with the facts of this case nor does it support the result reached by the panel. Toussaint did not involve a consent decree. The issue in Toussaint was whether the district court properly appointed a monitor after the district court had found

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[8] Toussaint was later amended and republished at 926 F.2d 800, cert. denied, ___ U.S. ____, 112 S.Ct. 213 (1991).

that the prison administrators had not willfully violated the due process rights of any prisoner. Toussaint is consistent with cases that hold that courts should not enter injunctions when there are no constitutional violations. E.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). It does not, however, stand for the proposition that consent decrees should dissolve in the absence of ongoing constitutional violations.

The panel continued to focus obsessively on the question of constitutional compliance in 1992 when it vacated and remanded the case to the district court after the limited remand. The panel incorrectly suggested that even where parties have settled cases, courts may not enforce those settlements, "subject only to judicial intervention to preserve constitutional rights." App. at

D-8. Once more, the panel directly tied judicial authority to a finding of a constitutional violation, a result wholly inconsistent with Rufo.[9]

The state's subsequent motion to vacate consent decree, which is the foundation for this particular proceeding, claimed that

> [t]he basis for vacating the Consent Decree is the entry of a memorandum order entered by the Ninth Circuit Court of Appeals on August 4, 1992 holding that all of the agreements set forth in Part III of the Decree have been fulfilled and there are currently no Eighth Amendment violations that would vest this Court with jurisdiction.

(emphasis added) The state's argument seems to be that once constitutional violations are cured, a federal court loses jurisdiction over the consent decree, even though the parties may have,

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[9] The Ninth Circuit panel never mentioned Rufo in any of its orders, despite the prisoners' many efforts to apprise the court of its relevance.

consistent with Rufo, agreed to more than constitutionally required. This illogical argument both ignores Rufo and fails to recognize that consent decrees are not only contracts between the parties, but judicial orders. E.g., United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975).

Finally, in its most recent opinion, the panel continued to rely for its result on the purported absence of ongoing constitutional violations. 8 F.3d at 658, 659. Viewing the arguments of the state and the opinions of the panel as a whole, it is clear that this panel did, in fact, decide that the consent decree should dissolve solely because the prisoners did not show ongoing constitutional violations.

The Ninth Circuit's holding is in conflict with other courts of appeals that have considered similar issues. Further,

the Ninth Circuit has decided this important question in a way that conflicts with this Court's consistent pronouncements. Since no other court has ever reached such a conclusion, the Court should grant certiorari to decide whether the asserted absence of constitutional violations is sufficient to justify vacating a consent decree.

B. The Ninth Circuit Did Not Examine the Language of the Decree When It Purported to Interpret the Decree.

The district court and the court of appeals erred by not carefully examining the language used by the parties when they settled this case. This Court has held that, in interpreting an existing consent decree, courts must look first to the actual language the parties have chosen:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense,

> and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681-2 (1971) (italics in original; emphasis added; footnote omitted).

Except for the Magistrate Judge, who concluded that the decree required a

permanent population cap, the courts below did not pay sufficient attention to the language of the decree "as it is written." Id. The critical language in the decree states:

> The parties stipulate to a continuation of this court's jurisdiction, and to the continued utilization of this court's Magistrate, for the purposes, and to the extent specified, below. Such jurisdiction will continue until such time as this agreement, on motion of either party or this court, is deemed to be fully consummated. At the close of jurisdiction, orders will enter making a final judgment incorporating the terms herein. Commitments made herein are binding on plaintiffs, defendants, defendants' successors, officers and agents.

Consent Decree, Article II (emphasis added); App. at K-2. This language requires that the final judgment must incorporate the terms of the decree. The population reduction required by Article III, A, paragraph 1, is one of the "terms" of the decree that must be incorporated

into the final judgment.[10] In fact, given

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[10] The population cap is established in the decree as follows:

III
AGREEMENTS

A. Defendants agree as follows:

1. Defendants have prepared an adult correction master plan. One feature of such plan deals with strategies for a systemwide population reduction. That section also explains the logic for those strategies. Portions relevant to the Reformatory are attached hereto and by this reference incorporated herein. Defendants accordingly agree to perform the plan, as per these specific goals for population reduction relative to population within the walls of the Reformatory:

DATE	POPULATION
April 1, 1981	865
July 1, 1981	850
October 1, 1981	790
December 1, 1981	735
July 1, 1983	656

"Within the Reformatory walls" excludes the honor farm, Reformatory work release facility, and the recently constructed 144 bed special offender center. Given the difficulty of making accurate predictions, exact guidelines are not useful for the period between December 1, 1981 and July 1, 1983. Defendants will, however, gradually reduce population between those two times.

App. at K-3 - K-5.

the parties' essential abandonment of attempts to resolve the disputes about food service and medical screening through this litigation, the population cap is the only term of the consent decree that is to be incorporated in the final judgment.

The actual language of the decree, therefore, calls for a final judgment that includes the population cap, just as the Magistrate Judge recommended. Such a judgment would finally and permanently resolve this litigation (absent efforts by the state to seek a Rule 60(b) modification).

This Court revisited the Armour admonition that the "scope of a consent decree must be discerned within its four corners" in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574-5 (1984). The Stotts analysis is instructive as there the Court examined both what the consent decree at issue said

as well as what it did not say. The Court stated that had the interpretation urged by one party been intended, "it is much more reasonable to believe that there would have been an express provision to that effect." Id. Similarly, had the parties in the present case intended that this decree would dissolve once the state complied with its terms or with the Constitution, "it is much more reasonable to believe" that they would have included an express provision to that effect.

The parties could have limited the duration of the decree as is common in other consent decrees. See, e.g., Thompson v. Enomoto, 915 F.2d 1383, 1385, n.1 (9th Cir. 1990) cert. denied, ___ U.S. ___, 112 S.Ct 965 (1992) (decree stated: "At the end of one year from the date of this decree, by which time the terms of this decree shall have been implemented, this action shall be dismissed in its

entirety."). As Stotts suggests, the absence of provisions that would dissolve the decree upon full consummation -- as is the case here -- supports the construction that requires a population cap to be incorporated into the final judgment under Article II.

The courts below did not examine the language in Article II requiring incorporation of the decree's terms into any final judgment when they interpreted the decree. The courts noted, though, that Article III, A, 1 required defendants to "reduce" the WSR population to its design capacity, not specifically to "maintain" the population at that level. App. at B-2 - B-3; A-7. 8 F.3d at 659. The parties, however, used the term "reduction" in the decree to refer to the permanent population reduction they intended. Indeed, the dictionary defines "reduction" not only as the "act of reducing," but

also as "the result of reducing." American Heritage Dictionary, New College Edition (1976). The parties' use of the phrase "population reduction" in Article III, A, 1 refers to the result of the act of reducing -- that is, a population cap. Inherent in the phrase is the requirement that the population reduction be maintained.[11] The prisoners never would have agreed to a settlement that permitted the state to increase the WSR population to pre-existing levels (or higher) immediately after the population reduction was completed. Yet that is precisely the result permitted by the lower courts' isolation and misreading of the term "reduce" and their disregard of

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[11] Until very recently the state did not interpret the language in the way the lower courts did. In June 1988, a Senior Assistant Attorney General of Washington stated that, "the current consent order limits overall institution capacity to 656 inmates." CR 617, Exhibit A.

the requirement that the final judgment incorporate the terms of the decree.

The Ninth Circuit panel, as with the district court, did not attempt to interpret the plain language the parties agreed to in the decree. Because of its singular focus on constitutional compliance, the panel simply and summarily rewrote the decree to eliminate the population cap.

The district court too chose to ignore the actual language of the decree. That court felt bound by the Ninth Circuit's earlier orders to dissolve the decree, regardless of the parties' agreement, unless there were ongoing constitutional violations. The prisoners have uncovered no authority from any court suggesting that the interpretation of a consent decree should be influenced by whether there are ongoing constitutional violations at the institution that is the

subject of the decree. The panel opinion to that effect so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

In this case, the Court of Appeals for the Ninth Circuit has rendered a decision that conflicts with decisions of other courts of appeals and is inconsistent with the holdings of this Court. This Court should grant certiorari to decide two important questions: (1) what are the appropriate considerations for courts faced with interpretation of federal court consent decrees? and (2) should a consent decree be vacated merely because the court finds no ongoing constitutional violations at the institution governed by the decree?

Respectfully submitted,

_____

Robert A. Stalker, Jr.
WSBA No. 13650
Attorney for Petitioners
EVERGREEN LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-5933

DATED: _____, 1994

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BISHOP COLLINS; MARIO VALDEZ; GARY TAYLOR; BILLY BELL; ROBERT HALSTIEN; DANIEL EVANS and RANDY REED, suing on behalf of themselves and all others similarly situated,	No. 93-35245
Plaintiffs-Appellants,	D.C. No. CV-78-00013(V)R
V.	OPINION
GERALD THOMPSON, et al.,	
Defendant-Appellee.	

Appeal from the
United States District Court
for the Western District of Washington
Barbara J. Rothstein
Chief District Judge, Presiding

Submitted* October 15, 1993
San Francisco, California

Filed October 25, 1993

Before: Eugene A. Wright,
David R. Thompson and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Wright

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 3404.

OPINION

WRIGHT, Circuit Judge:

This appeal involves a consent decree between Washington state and inmates at the Washington State Reformatory which required the state to reduce inmate population. Because the state has reduced inmate population and because there are no ongoing constitutional violations at the reformatory, we affirm the district court's order vacating the decree.

Inmates at the reformatory filed a complaint against the state in February 1978. It alleged violations of 42 U.S.C. § 1983 because of the living conditions at the institution. The parties entered into a consent decree in June 1981 which, among other things, required the state to reduce the inmate population to 656. Part II of the consent decree, the primary subject of this appeal, read:

> The parties stipulate to a continuation of this court's jurisdiction, and to the continued utilization of this court's Magistrate, for the purposes, and to the extent specified, below. Such jurisdiction will continue until such time as this agreement, on motion of either party or this court, is deemed to be fully consummated. At the close of jurisdiction, orders will enter making a final judgment incorporating the terms herein.

The district court approved the decree.

The state met the population goal in 1987. Shortly thereafter, the state began to renovate the reformatory, temporarily reducing the number of available cells. The district court modified the consent decree and temporarily reduced the maximum inmate population to 348, reflecting the number of cells available during renovation. The state appealed the temporary reduction order but dismissed the appeal in order to request the district court to vacate the decree.

The state moved to vacate the decree in February 1990. The district court

denied the motion because the temporary reduction order was still in effect. The state appealed, asserting that the consent decree was consummated in 1987 when inmate population was reduced to 656 and that final judgment should be entered.

We remanded and instructed the district court to enter finding of fact and law as to (1) whether the consent decree was fully consummated in 1987 when the reformatory reduced inmate population to 656; (2) whether a final judgment should be entered; and (3) whether the final judgment should include a permanent cap on inmate population. On remand, the district court held that the consent decree was not fully consummated until renovation of the building was complete. The state appealed.

In August 1992, we vacated the district court's order and remanded with instructions to enter a final judgment "as

contemplated by the consent decree." We held that the reformatory satisfied the terms of the agreement in 1987 when it reduced inmate population to 656 and that the renovation project was extraneous to the decree.

On remand, the district court found that there were no present or ongoing constitutional violations. It entered final judgment and vacated the decree, terminating the court's jurisdiction. The inmates appeal and argue two issues: (1) whether the district court properly interpreted the consent decree and entered a final judgment "as contemplated by the parties," and (2) whether the district court should exercise continuing jurisdiction.

1. The District Court Properly Entered Final Judgment Interpreting the Terms of the Decree As Ordered By This Court

"Interpretation of a consent decree is a question of law reviewed de novo." Thompson v. Enomoto, 915 F.2d 1383, 1388 (9th Cir. 1990), cert. denied, 112 S. Ct. 965 (1992). When interpreting the terms of a consent decree, the court applies general contract principles using the law of the state where the agreement was made. Collins v. Thompson, 679 F.2d 168, 170 (9th Cir. 1982). Washington follows the context rule of contract interpretation. Berg v. Hudesman, 801 P.2d 222, 229 (Wash. 1990). Under that rule, a court must consider "the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." Id.

We instructed the district court to interpret the terms of the consent decree and enter a final judgment. That court

said that the only issue separating the parties was whether a final judgment should limit inmate population to 656. Because of the clear language of the consent decree, it found that the state was only required to reduce the inmate population to 656, not to maintain the population at that level. It also found that imposing a permanent population cap would require continuing jurisdiction and conflict with our clear order that jurisdiction end. The district court properly examined the terms of the agreement and entered final judgment accordingly.

2. Continuing Jurisdiction Was Properly Denied

The inmates argue that the court should continue its jurisdiction on an inactive basis to ensure that state officials do not violate any other constitutional rights or provisions of the

final judgment. The state argues that the court should not maintain continuing jurisdiction in the absence of constitutional violations because it would be intrusive and implicates important federalism concerns.

The court properly refused to exercise continuing jurisdiction when it vacated the consent decree. A federal court may refuse to exercise continuing jurisdiction even though the parties have agreed to it. Parties cannot confer jurisdiction by stipulation or consent. California v. La Rue, 409 U.S. 109, 112-13 n.3 (1972); Morongo Band of Mission Indians v. California State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989).

In another prisoner rights case, we refused to continue a court-supervised monitoring program over a prison absent

substantial evidence of continuing constitutional violations. Toussaint v. McCarthy, 926 F.2d 800, 802 (9th Cir. 1990), cert. denied, 112 S. Ct. 213 (1991). In Toussaint, we found no justification for the district court's order continuing the monitoring program in the absence of current violations. Id.

Similarly, the district court in this case said that "there are no present violations of constitutional rights" and that continued supervision would "result in the court's over-involvement in the management of the state's prison." Once again we decline to exercise continuing jurisdiction over state prison administration absent ongoing constitutional violations.

AFFIRMED.

ENTERED 2/9/93

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al., Plaintiffs, vs. GERALD THOMPSON, et al., Defendants.	CASE NO. C-78-13R C-78-79R FINAL JUDGMENT

THIS MATTER is before the court on the Report and Recommendation of Magistrate Judge Sweigert, and on the objections to the Report and Recommendation filed by the defendants.

The court adopts the statement of the procedural history of this case set forth in the Magistrate's Report and in the defendants' proposed final order. This litigation, which began nearly fifteen

years ago when plaintiff inmates filed their action against defendant prison officials, is now in its final stages. On August 4, 1992, the Ninth Circuit ruled that the consent decree which has been at the center of this lawsuit for the past twelve years had been fully consummated. The circuit court therefore directed this court to enter a final judgment as contemplated in the consent decree. The parties have submitted proposed final judgments.

As Magistrate Judge Sweigert has noted, the only issue separating the parties is whether the final judgment should include a provision limiting the inmate population to 656. The consent decree itself stated that defendants would reduce the inmate population to 656; the decree set forth specific dates by which various interim reductions were to be achieved. The Ninth Circuit has found that

the goal population of 656 was achieved in 1987, at which time the consent decree was consummated. The decree does not state that the population would be maintained at 656, although the final judgment it contemplates is to incorporate the terms of the decree.

Plaintiffs maintain that it is essential that a provision permanently capping the population be made a part of the final judgment. Plaintiffs argue that defendants have no intention of honoring the commitments they entered into when they signed the consent decree, and that defendants can only be held to their obligations if this court continues to supervise the institution.[1]

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[1] In urging the court to continue to play a role in the management of the prison, plaintiffs distinguish among various levels of judicial supervision. Plaintiffs' suggestion is that a less intrusive method of supervision may be acceptable even if more rigorous supervision is no longer appropriate. Thus

The Ninth Circuit has twice indicated its views on the question of whether this court should retain jurisdiction over this matter. In its order dated February 13, 1992, the Ninth Circuit directed this court to determine whether or not the final order called for in the consent decree should include a permanent cap on population; the circuit court specifically referred this court to the case of Toussaint v. McCarthy, 926 F.2d 800 (9th

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plaintiffs argue that the court might terminate its jurisdiction over the case, and yet not dissolve the decree; in the same vein, plaintiffs suggest that the court might put the case on its "inactive docket."

Although the court does not disagree that there may be significant distinctions among these different levels of judicial involvement, or that in certain situations courts have found it convenient to maintain a case in "inactive" status, the clear thrust of the orders handed down by the Ninth Circuit in this case, as discussed below, is that judicial supervision should come to an end. The court therefore finds it unnecessary to select among the various levels of supervision discussed by plaintiffs.

Cir. 1990), cert. denied, 112 S.Ct. 213 (1991). In Toussaint, the district court had modified an injunction by appointing a "monitor" who would review decisions to place prisoners in administrative segregation. The Ninth Circuit found the appointment of the monitor to be unjustified, since the record revealed no willful violations of the prisoners' due process rights. Although Toussaint is distinguishable from the present case in various ways detailed by plaintiffs, in this case, as in Toussaint, there are no present violations of constitutional rights. On the contrary, the court's continued intervention would be premised on the assumption that without judicial supervision, future violations will occur. This assumption, Toussaint instructs, will result in the court's over-involvement in the management of the state's prison.

The concerns implicit in Toussaint were made even clearer in the Ninth Circuit's second directive to this court on the subject of a final judgment. In a memorandum decision filed on August 4, 1992, the Ninth Circuit summarized the history of this court's involvement in the present case by stating that "extension of the coverage of the consent decree has inexorably led the district court to govern the penitentiary by judicial decree, rather than allow the executive officers of the State to manage it, subject only to judicial intervention to preserve constitutional rights." Memorandum Op. at p. 4. In light of its clearly-expressed disapproval of this court's continued involvement in the case, the Ninth Circuit vacated an earlier order in which this court had denied defendants' motion to vacate the consent decree. The

Ninth Circuit also directed this court to enter a final judgment.

Plaintiffs argue that despite the disapproval of judicial supervision expressed in the Ninth Circuit's two orders, the final judgment should contain a permanent population cap -- which would ensure continuing supervision. Plaintiffs cite Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748 (1992), in which the Supreme Court stated that a party seeking modification of a consent decree must show that compliance with the decree has become substantially more onerous than anticipated. Rufo, however, is distinguishable: in the present case, the court need not concern itself with the question of whether modification is appropriate, because the Ninth Circuit has already ordered the court to enter a final judgment. Thus the only question remaining is what the content of the final judgment

should be. On this point, the court is confronted with a choice between a judgment which would ensure its continuing involvement in the case through the mechanism of a permanent population cap, and a judgment which would terminate its involvement in this matter. Given the clear message conveyed by the Ninth Circuit's two orders, the court has little difficulty in choosing the first option, and therefore will adopt defendants' proposed final judgment. Plaintiffs remain free to recommence litigation should new constitutional violations occur, and also remain free to use the now dissolved consent decree as evidence of any alleged wrongdoing on the part of defendants.

NOW, THEREFORE, defendants' motion to vacate the consent decree is GRANTED, and defendants' proposed final order is ADOPTED.

DATED at Seattle, Washington this 8th day of February, 1993.

s/

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al., Plaintiffs, vs. GERALD THOMPSON, et al., Defendants.	No. C-78-13R No. C-78-79R FINAL JUDGMENT (DEFENDANTS' PROPOSED)

I. BASIS

This matter comes before the Court pursuant to the Ninth Circuit's August 4, 1992 Memorandum Order. The Memorandum Order vacates this court's order of November 28, 1990 which denied the defendants' motion to vacate the consent decree. The Memorandum Order remands the case and instructs the district court to enter a final judgment as contemplated by the consent decree. Having reviewed the

Order and the record and file to date, and being fully advised, the Court does hereby find and enter a final judgment as follows:

II. PROCEDURAL HISTORY

The plaintiffs, inmates at the Washington State Reformatory (WSR), filed this action in 1978 pursuant to 42 U.S.C. § 1983. The plaintiffs alleged that the conditions of confinement at WSR violated their Eighth Amendment protection against cruel and unusual punishment. In 1981, the parties entered into a consent decree. The terms of the decree required a reduction of the inmate population at WSR to 656 by July 1, 1983; studies in various program areas, including food service and medical screening; a continuation of certain staffing and program levels; and continuation of the Court's jurisdiction until the decree was fully consummated.

Pursuant to Article II of the decree, the jurisdiction of the district court was to continue until such time as the agreement, on motion of either party or the court, was deemed to be fully consummated. At the close or termination of jurisdiction, a final judgment incorporating the terms of the decree was to be entered.

By 1987, in accordance with several court approved schedule modifications, the state achieved the population reduction goal of 656 inmates and fully completed or complied with the program study aspects and other terms of the consent decree. Appropriate recommendations of the program studies were implemented by the defendants in a mutually satisfactory manner. Independent of the requirements of the decree, the state also began a 30 month renovation project which involved complete

renovation of all facilities within the reformatory.

As part of the renovation project, approximately one-half the available celis at the reformatory became unavailable for a period of time. The inmates were granted a temporary modification of the consent decree reducing the prisoner population to 348, which reflected the number of available cells during the renovation.

In 1989 the state appealed the temporary population reduction order and filed its first motion to dissolve the decree. In July 1989, the district court ruled that it lacked jurisdiction to hear the motion to vacate in light of the pendency of the state's appeal of the temporary modification. The state subsequently withdrew its appeal so that jurisdiction would again vest in the district court.

In February 1990 the state filed its second motion to vacate the consent decree pursuant to Fed. R. Civ. P. 60(b)(4), (5), (6) and the terms of Article II of the decree. On November 28, 1990, the district court denied the state's motion, concluding that it would be premature to vacate the decree while the temporary modification was still in effect. The state appealed this ruling and argued that the consent decree had been fully consummated in 1987, when the state achieved all of the goals set forth in the decree.

Following oral argument, on February 13, 1992, the Ninth Circuit remanded the case for the limited purpose of entering findings of fact and conclusions of law on the following matters:

> (1) Whether the consent decree has been "fully consummated" within the terms of Article II thereof. If the court decides the consent decree has not been fully consummated based

wholly or in part on the current remodeling project mentioned in the magistrate 'so report and recommendation dated October 16, 1990, the district court shall find the current status of the project and specifically state how that relates to full consummation under the consent decree.

(2) Whether a final judgment should not be entered, and if not, why not; if a final judgment should now be entered, what the language of that judgment will be, including whether it should include a permanent injunction capping prisoner population at the Washington State Reformatory, specifically considering the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991).

On May 7, 1992, the district court entered Findings of Fact and Conclusions of Law finding, inter alia, that the only outstanding matter before the court was the issue of inmate population, that the present number of cells currently available at the reformatory during renovation construction (632) is less than the population goal set forth in the consent decree (656) thereby creating double-celling. Declining to enter a final

judgment, the court concluded that the consent decree will not be deemed fully consummated until the renovation project is complete.

The state appealed the district court's order declining to enter a final judgment. On August 4, 1992, the Ninth Circuit vacated the district court's order denying the state's motion to vacate the consent decree and remanded the case to the district court with instructions to enter a final judgment as contemplated in the consent decree.

III. FINAL JUDGMENT

1. The terms of the consent decree are set forth in Attachment "A". The terms of the consent decree were fully consummated in 1987, when the defendants completed the various studies, complied with other terms and reached the population goal specifically contemplated by the decree. The state defendants have

abided by the population goals and other terms of the decree, as modified by subsequent order of the court, since that time. The plaintiff class has not raised any issues of Eighth Amendment violations in areas addressed by the decree in the context of this litigation since the 1987 date of consummation of the decree.

2. Pursuant to the motion of the Defendants to vacate the decree pursuant to Article II of the decree and Fed. R. Civ. P. 60 (b), the decree is hereby vacated and the Defendants are relieved from further prospective application of its terms.

3. Pursuant to Article II and Article IV of the decree, the jurisdiction of the court is terminated and the action dismissed with prejudice.

4. This final judgment does not include a permanent injunction capping prisoner population at the Washington

State Reformatory, nor impose any other requirement on the defendants. IT IS, THEREFORE, ORDERED as follows:

A final judgment is entered vacating the consent decree and dismissing this action with prejudice, according to the terms set forth herein.

DATED this ____ day of _____, 1992.

_____
BARBARA J. ROTHSTEIN
Chief Judge, United States
District Court

Presented by:

KENNETH O. EIKENBERRY
Attorney General

s/
_____
KATHLEEN D. MIX
Sr. Assistant Attorney General
WSBA # 07453

s/
_____
JOHN SCOTT BLONIEN
Assistant Attorney General
WSBA # 11344

Approved as to form:

_____

ROBERT A. STALKER
Attorney for Plaintiffs
WSBA # 13650

ENTERED
NOVEMBER 23, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al., Plaintiffs, vs. GERALD THOMPSON, et al., Defendants.	CASE NO. C-78-13R C-78-79R REPORT AND RECOMMENDATION

On September 1, 1992, the Ninth Circuit Court of Appeals vacated this Court's order of November 28, 1990, denying the state's motion to vacate the consent decree, and remanded the case with instructions to enter final judgment as contemplated by the consent decree (Dkt. No. 788). The state then filed a new motion to vacate the decree and plaintiffs responded. The matter is now before the

Court for entry of final judgment and the sole issue is whether that judgment should include a permanent population cap on the number of inmates housed "within the walls" of the reformatory. I conclude that the final judgment should include a provision limiting the inmate population to the reformatory's single cell capacity of 656 inmates.

The language of the consent decree itself contemplates that upon consummation of the agreements contained in the decree, the Court's jurisdiction will terminate and a final judgment will be entered "incorporating the terms herein." Consent Decree, Article II. The single most important term of the decree was a gradual reduction of the inmate population to its recommended single cell capacity of 656 inmates. To suggest that upon reaching that figure in 1987, the state was free to house double that number the very next

day, the result which would follow if the Court were to conclude that no population cap was contemplated, is, in my opinion, ludicrous. Nothing in the Circuit Court's order of remand suggests a contrary conclusion. The state argues that the Court of Appeals' reference to the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991), in its Amended Order of Limited Remand (Dkt. No. 780) directing this Court to determine whether the language of the final judgment should include a permanent injunction capping prisoner population at the reformatory is tantamount to a direction to this Court not to include such language. I believe Toussaint v. McCarthy, is distinguishable. Unlike the present case, it did not involve a consent decree in which state officials, without admitting any violation of constitutional principles, specifically agreed to take discrete action to bring

inmate population to a specific level. The law is clear that in a consent decree, the parties may be required to do more than the Constitution itself requires. Rufo v. Inmates of Suffolk County Jail, __ U.S. _____, 112 S.Ct. 748 (1992). I believe that implicit in the agreement to reduce the population to the recommended single cell capacity of 656 was an agreement to limit the inmate population to such level.

I recommend that the Court enter final judgment in substantially the form attached.

DATED this 23d day of November, 1992.

s/

Philip K. Sweigert
U.S. Magistrate Judge

LODGED
NOVEMBER 23, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al., Plaintiffs,	)	
vs.	)	CASE NO. C78-13R C78-79R
GERALD THOMPSON, et al., Defendants.	)	FINAL JUDGMENT

I. BASIS

This matter comes before the Court pursuant to the Ninth Circuit's August 4, 1992 Memorandum Order. The Memorandum Order vacates this Court's Order of November 28, 1990, which denied the defendants' motion to vacate the consent decree. The Memorandum Order remands the case and instructs the district court to

enter a final judgment as contemplated by the consent decree. Having reviewed the Order and the record and file to date, and being fully advised, the Court does hereby enter final judgment as follows:

II. PROCEDURAL HISTORY

The plaintiffs, inmates at the Washington State Reformatory (WSR), filed this action in 1978 pursuant to 42 U.S.C. §1983. The plaintiffs alleged that the conditions of confinement at WSR violated their Eighth Amendment protection against cruel and unusual punishment. In 1981, the parties entered into a consent decree. The terms of the decree required a reduction of the inmate population at WSR to 656 by July 1, 1983; studies in various program areas, including food service and medical screening; a continuation of certain staffing and program levels; and continuation of the Court's jurisdiction until the decree was fully consummated.

By 1987, in accordance with several court approved schedule modifications, the state achieved the population reduction goal of 656 inmates and fully completed or complied with the program study aspects and other terms of the consent decree. Appropriate recommendations of the program studies were implemented by the defendants in a mutually satisfactory manner. Independent of the requirements of the decree, the state also began a 30 month renovation project which involved complete renovation of all facilities within the reformatory.

As part of the renovation project, approximately one-half the available cells at the reformatory became unavailable for a period of time. The inmates were granted a temporary modification of the consent decree reducing the prisoner population to 348, which reflected the

number of available cells during the renovation.

In 1989, the state appealed the temporary population reduction order and filed its first motion to dissolve the decree. In July, 1989, this Court ruled that it lacked jurisdiction to hear the motion to vacate in light of the pendency of the state's appeal of the temporary modification. The state subsequently withdrew its appeal so that jurisdiction would again vest in the district court.

In February, 1990, the state filed its second motion to vacate the consent decree pursuant to F.R.Civ.P. 60(b)(4), (5), (6) and the terms of Article II of the decree. On November 28, 1990, this Court denied the state's motion, concluding that it would be premature to vacate the decree while the temporary modification was still in effect. The state appealed this ruling and argued that

the consent decree had been fully consummated in 1987, when the state achieved all of the goals set forth in the decree.

Following oral argument, on February 13, 1992, the Ninth Circuit remanded the case for the limited purpose of this Court entering findings of fact and conclusions of law on the following matters:

> (1) Whether the consent decree has been "fully consummated" within the terms of Article II thereof. If the court decides the consent decree has not been fully consummated based wholly or in part on the current remodeling project mentioned in the magistrate's report and recommendation dated October 16, 1990, the district court shall find the current status of the project and specifically state how that relates to full consummation under the consent decree
>
> (2) Whether a final judgment should not [sic] be entered, and if not, why not; if a final judgment should now be entered, what the language of that judgment will be, including whether it should include a permanent injunction capping prisoner population at the Washington State Reformatory, specifically considering

the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991).

On May 7, 1992, this Court entered Findings of Fact and Conclusions of Law finding, inter alia, that the only outstanding matter before the Court was the issue of inmate population, that the present number of cells currently available at the reformatory during renovation construction (632) is less than the population goal set forth in the consent decree (656), thereby creating double-celling. Declining to enter a final judgment, the Court concluded that the consent decree would not be deemed fully consummated until the renovation project is complete.

The state appealed the Court's order declining to enter a final judgment. On August 4, 1992, the Ninth Circuit vacated this Court's order denying the state's motion to vacate the consent decree and

remanded the case to the Court with instructions to enter a final judgment as contemplated in the consent decree.

III. FINAL JUDGMENT

A copy of the consent decree is set forth as Attachment "A". The terms of the consent decree were fully consummated in 1987, when the defendants completed the various studies, complied with other terms and reached the population goal specifically contemplated by the decree.

IT IS, THEREFORE, ORDERED: Pursuant to Article II and Article IV of the decree, the continuing jurisdiction of the Court is terminated and the state is permanently enjoined from increasing the inmate population of the Washington State Reformatory above 656 inmates "within the reformatory walls" as that term is defined in attachment "A".

DATED this ___ day of _____, 1992.

_____

Chief United States District Judge

FILED AUGUST 4, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BISHOP COLLINS, et al., Plaintiff-Appellee,	)	No. 91-35056
	)	D.C. No. CV-78-0013-BJR
v.	)	
	)	MEMORANDUM*
GERALD THOMPSON, et al., Defendant-Appellant.	)	

Appeal from the
United States District Court
for the
Western District of Washington
Barbara J. Rothstein,
District Judge, Presiding

Argued and Submitted December 4, 1991
Seattle, Washington
Submission Withdrawn December 20, 1991
Resubmitted July 21, 1992

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: WRIGHT, THOMPSON and T.G. NELSON, Circuit Judges.

This case began in 1978 as a class action by prisoners of the Washington State Reformatory alleging unconstitutional living conditions. See Collins v. Thompson, 679 F.2d 168, 169 (9th Cir. 1982). On June 12, 1981, the Prisoners and the State of Washington ("the State") entered into a consent decree which contained provisions for a population reduction and other reforms. The decree provided, inter alia, for the reduction of the population of the reformatory to 656 by July 1, 1983; for the court's continuing jurisdiction until the consent decree is fully consummated; and, when it has been consummated, for the court's entry of a final judgment incorporating the terms contained in the decree.

On November 18, 1982, the district court entered a modification order

deferring the schedule of dates for the State's required population reduction. By 1987, in accordance with several court approved schedule modifications, the State achieved the final reduction goal of 656 inmates and fulfilled the service and program aspects of the consent decree. Shortly thereafter, the State began a thirty-month renovation project which involved closing nearly half the cells. The Prisoners were granted a temporary modification of the consent decree reducing the prisoner population to 348, which reflected the number of available cells during the renovation. Renovations of Cellhouse Two have been completed, and completion of Cellhouse One is expected by December, 1992.

In 1989, the State appealed the temporary population reduction order (Collins v. Thompson, No. 89-35000 (9th Cir. Feb. 15, 1989)), and filed its first

motion to dissolve the decree. In July 1989, the district court ruled it had no jurisdiction to hear the Motion to Vacate in light of the pendency of the State's appeal of the modification. The State subsequently withdrew its appeal so that jurisdiction would again vest in the district court.

In February, 1990, the State filed its second motion to vacate the consent decree, pursuant to FED. R. CIV. P. 60(b)(4), (5), (6) and the terms in Part II of the decree. On November 28, 1990, the district court denied the State's motion, adopting the magistrate judge's recommendation that vacating the decree "would clearly be premature" with the temporary modification still in effect. The State presently appeals, arguing that the consent decree had been fully consummated in 1987.

Following oral argument, on February 13, 1992, this court remanded the case for the limited purpose of entering findings of fact and conclusions of law on the following matters:

> (1) Whether the consent decree has been "fully consummated" within the terms of Article II thereof. If the court decides the consent decree has not been fully consummated based wholly or in part on the current remodeling project mentioned in the magistrate's report and recommendation dated October 16, 1990, the district court shall find the current status of the project and specifically state how that relates to full consummation under the consent decree.
>
> (2) Whether a final judgment should not [sic] be entered, and if not, why not; if a final judgment should now be entered, what the language of that judgment will be, including whether it should include a permanent injunction capping prisoner population at the Washington State Reformatory, specifically considering the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991).

On May 7, 1992, the district court entered Findings of Fact and Conclusions of Law finding, inter alia, that the only

outstanding matter before the court was the issue of inmate population, that the present number of cells currently available at the reformatory during renovation construction (632) is less than the population goal set forth in the consent decree (656), thereby creating double-celling. Declining to enter a final judgment, the court concluded that the consent decree will not be deemed fully consummated until the renovation project is complete. The court deferred consideration of whether the final judgment should include a permanent population cap until the final judgment is entered.

In an order filed June 23, 1992, this court permitted the parties to file supplemental briefs addressing the district court's findings.

DISCUSSION

The State defendants are correct in their contention that the consent decree was fully consummated in 1987, when the population cap specifically contemplated in the decree was reached. The subsequent remodeling projects engaged in by the State were extraneous to the situation addressed by the parties in the consent decree and thus outside its terms. The State cannot be held to have agreed to application of the consent decree to matters not within the parties' contemplation when it was executed. See Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 522 (1986) ("Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all.").

Extension of the coverage of the consent decree has inexorably led the

district court to govern the penitentiary by judicial decree, rather than allow the executive officers of the State to manage it, subject only to judicial intervention to preserve constitutional rights. See Toussaint v. McCarthy, 926 F.2d 800, 802 (9th Cir.), cert. denied, 112 S. Ct. 213 (1991).

Therefore, we vacate the district court's order of November 28, 1990, denying the State's motion to vacate the consent decree, and remand the case to the district court with instructions to enter final judgment as contemplated by the consent decree.

VACATED and REMANDED.

ENTERED
MAY 7, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al.,	)	No. C-78-13R
	)	No. C-78-79R
Plaintiffs,	)	
	)	FINDINGS OF FACT
vs.	)	AND CONCLUSIONS
	)	OF LAW ON AMENDED
GERALD THOMPSON, et al.,	)	ORDER OF LIMITED REMAND
	)	
Defendants.	)	

THIS MATTER comes before the court on an amended Order of Limited Remand from the Ninth Circuit. Having reviewed the Order and all relevant documents in the file, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiffs are inmates at the Washington State Reformatory. They filed this action in 1978 pursuant to 42 U.S.C.

§ 1983, alleging that general conditions of confinement at the Reformatory violated their Eighth Amendment protection against cruel and unusual punishment. In 1981, the court entered a consent decree, which required that the inmate population at the Reformatory be reduced to 656, and that studies be made regarding staffing, food service, and other conditions at the Reformatory.

In 1988 defendants commenced a complete renovation of the prison. On November 30, 1988, the court granted plaintiffs' motion to modify the consent decree to require that defendants cap the inmate population at 348 during the renovation. On September 18, 1989, the Ninth Circuit dismissed defendants' appeal from the order modifying the consent decree. On November 28, 1990, the court denied defendants' motion to vacate the consent decree. Defendants appealed that

denial to the Ninth Circuit, which now has remanded the case to this court for the limited purpose of making findings of fact and conclusions of law on the following matters:

> (1) Whether the consent decree has been "fully consummated" within the terms of Article II thereof. If the court decides the consent decree has not been fully consummated based wholly or in part on the current remodeling project mentioned in the magistrate's report and recommendation dated October 16, 1990, the district court shall find the current status of the project and specifically state how that relates to full consummation under the consent decree.
>
> (2) Whether a final judgment should now be entered, and if not, why not; if a final judgment should now be entered, what the language of that judgment will be, including whether it should include a permanent injunction capping prisoner population at the Washington State Reformatory, specifically considering the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991).[1]

---

[1] The Ninth Circuit instructed this court to issue its findings, conclusions and order or judgment no later than sixty days from entry of the amended order of limited remand, February 13, 1992. This

II. FINDINGS OF FACT

1. The consent decree entered in 1981 provides that the court's jurisdiction "will continue until such time as this agreement, on motion of either party or this court, is deemed to be fully consummated. At the close of jurisdiction, orders will enter making a final judgment incorporating the terms herein."

2. It is undisputed that the requirements of the consent decree with respect to medical screening; food services; programming; officer training; and counselling have been satisfied. The only outstanding matter is the issue of inmate population. See Plaintiff's Proposed Findings of Fact and Conclusions of Law, Page 4, lines 26-28.

Order is being issued after the Ninth Circuit's deadline, for which the court formally apologizes.

2. The consent decree requires that the inmate population at the Reformatory be reduced to 656. The purpose of the reduction is to eliminate severe overcrowding of inmates.

3. In 1988, the consent decree was modified by the court to reduce the inmate population to 348 pending completion of a renovation project at the facility.

4. The total number of cells currently available at the Reformatory is 632. See Affidavit of Michael G. Woods, Associate Superintendent for Custody at Washington State Reformatory, page 4, lines 15-16. The projected completion date for renovation at the Reformatory is December 6, 1992. See id., Page 4, lines 19-21. When the renovation is complete, the total number of available cells will be 749. See id., Page 5, lines 4-5.

5. The total number of cells currently available at the Reformatory

(632) is less than the population goal set forth in the 1981 consent decree (656).

6. In order for consummation of the consent decree to be meaningful, the population goal set by the decree should not create overcrowding. At the present time, that population goal would create double celling.

7. The 1988 modification to the consent decree contemplated that a population cap would remain in effect until the renovation was complete.

8. Based on the status of the renovation project, the court finds that the consent decree is not fully consummated.

III. CONCLUSIONS OF LAW

1. Having determined above that the decree will not be deemed consummated until the renovation project is complete, the court hereby declines to enter final judgment at this time.

2. The court will defer consideration of whether the final judgment should include a permanent population cap in light of Toussaint, 918 F.2d at 782, until such time as final judgment is entered.

It is, therefore, ORDERED as follows:

This court will retain jurisdiction until the completion of the renovation project at which time the parties shall move for entry of final judgment.

DATED at Seattle, Washington this 6th day of May, 1992.

s/

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

FILED
DECEMBER 20, 1991

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BISHOP COLLINS, et al.	No. 91-35056
Plaintiff-Appellee,	D.C. NO. CV-78-0013-BJR
v.	ORDER OF
GERALD THOMPSON, et al.	LIMITED REMAND
Defendant-Appellant.	

Before: WRIGHT, THOMPSON and T.G. NELSON, Circuit Judges.

This case is remanded to the district court for the limited purpose of entering findings of fact and conclusions of law on the following matters:

(1) Whether the consent decree has been "fully consummated" within the terms of Article II thereof. If the court decides the consent decree has not been fully consummated based wholly or in part on the current remodeling project

mentioned in the magistrate's report and recommendation dated October 16, 1990, the district court shall find the current status of the project and specifically state how that relates to full consummation under the consent decree.

(2) Whether any violations of the Eighth Amendment to the Constitution of the United States currently exist at the Washington State Reformatory and, if so, the remedial measures necessary to correct such violations.

(3) Whether a final judgment should now be entered, and if not, why not; if a final judgment should now be entered, what the language of that judgment will be, including whether it should include a permanent injunction capping prisoner population at the Washington State Reformatory, specifically considering the case of Toussaint v. McCarthy, 918 F 2d 752 (9th Cir. 1991).

In complying with the mandate of this limited remand, the district court may take such evidence and hold such hearings as it deems appropriate. In the event the district court determines the consent decree is fully consummated, it shall enter the final judgment found appropriate under paragraph (3) hereof.

The district court shall forward its findings, conclusions and order or judgment to this court no later than sixty days from entry of this order. If the district court enters a final judgment, challenges by the parties to that judgment shall be deemed to be encompassed within this pending appeal.

Any party may apply to the clerk of this court for entry of an order establishing a supplemental briefing schedule following action by the district court pursuant to this remand.

Submission of this case is deferred until further order of the court.

FILED
FEB. 13, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BISHOP COLLINS, et al.,	)	No. 91-35056
	)	
Plaintiff-Appellee,	)	D.C. NO.
	)	CV-78-0013-BJR
v.	)	
	)	AMENDED ORDER
GERALD THOMPSON, et al.,	)	OF LIMITED
	)	REMAND
Defendant-Appellant.	)	
	)	

Before: WRIGHT, THOMPSON and T.G. NELSON, Circuit Judges.

The appellees' motion for reconsideration is granted in part. Paragraph 2 of the Order of Limited Remand filed December 20, 1991 is stricken. The sixty-day period for the district court to forward its findings, conclusions and order or judgment to this court will begin from the date of the entry of this order. The Order of Limited Remand, therefore, is amended to read as follows:

This case is remanded to the district court for the limited purpose of entering findings of fact and conclusions of law on the following matters:

(1) Whether the consent decree has been "fully consummated" within the terms of Article II thereof. If the court decides the consent decree has not been fully consummated based wholly or in part on the current remodeling project mentioned in the magistrate's report and recommendation dated October 16, 1990, the district court shall find the current status of the project and specifically state how that relates to full consummation under the consent decree.

(2) Whether a final judgment should now be entered, and if not, why not; if a final judgment should now be entered, what the language of that judgment will be, including whether it should include a permanent injunction capping prisoner

population at the Washington State Reformatory, specifically considering the case of Toussaint v. McCarthy, 918 F.2d 752 (9th Cir. 1991).

In complying with the mandate of this limited remand, the district court may take such evidence and hold such hearings as it deems appropriate. In the event the district court determines the consent decree is fully consummated, it shall enter the final judgment found appropriate under paragraph (2) hereof.

The district court shall forward its findings, conclusions and order or judgment to this court no later than sixty days from entry of this order. If the district court enters a final judgment, challenges by the parties to that judgment shall be deemed to be encompassed within this pending appeal.

Any party may apply to the clerk of this court for entry of an order

establishing a supplemental briefing schedule following action by the district court pursuant to this remand.

Submission of this case is deferred until further order of the court.

ENTERED NOV. 28, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al.,	)	CASE NO. C-78-13R
	)	C-78-79R
Plaintiffs,	)	
	)	
vs.	)	ORDER
	)	
GERALD THOMPSON, et al.,	)	
	)	
Defendants.	)	
	)	

The Court, having considered defendants' motions to vacate the Consent Decree, the memoranda of the parties, the Report and Recommendation of United States Magistrate Philip K. Sweigert, and the balance of the records and files herein, does hereby find and ORDER:

(1) Said Report and Recommendation is approved and adopted;

(2) Defendants' motions to vacate the Consent Decree are DENIED; and,

(3) The Clerk is to direct copies of this Order to counsel of record and to Magistrate Sweigert.

DATED this 28th day of November 1990.

s/ Barbara J. Rothstein

Chief United States
District Judge

ENTERED OCT. 18, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al.,	)	
	)	CASE NO. C-78-13R
	)	C-78-79R
Plaintiffs,	)	
	)	REPORT AND
vs.	)	RECOMMENDATION
	)	
GERALD THOMPSON, et al.,	)	
	)	
	)	
Defendants.	)	

INTRODUCTION AND SUMMARY CONCLUSION

Defendants move, pursuant to F.R.Civ.P. 60(b)(4), to vacate the Consent Decree entered in August, 1971 [sic], on the grounds that the Decree is void as in excess of the jurisdictional limitations imposed on this Court by the Eleventh Amendment. Alternatively, defendants move, pursuant to F.R.Civ.P. 60(b)(5), to vacate the Decree as fully satisfied. As a second

alternative, defendants move the Court, also pursuant to F.R.Civ.P. 60(b)(5), for an Order providing for a ceiling on the inmate population only for a finite period of time. After a careful review of the parties' memoranda, I conclude defendants' motions should be denied.

PROCEDURAL BACKGROUND

The Consent Decree entered by this Court in 1981 to resolve the instant litigation challenging the conditions of confinement at the Washington State Reformatory (WSR), contained a provision requiring reduction of the WSR population to 656, its then rated single cell capacity. While there were a number of other provisions dealing with staffing, food service, and other conditions, capping of the population was clearly the single most important provision in the Decree.

Shortly after the case had apparently been settled, defendants filed a motion objecting to entry of the Decree insofar as it reduced the population to 656. After hearing, the Court found that defendants were contractually bound and entered the Decree with its present language. The Decree was affirmed on appeal. Collins v. Thompson, 679 F.2d 168 (9th Cir. 1982).

Following resolution of the appeal in 1982, defendants moved for and obtained an Order modifying the Decree for a temporary suspension of the time table for population reduction. In 1983, defendants obtained a second modification providing for a temporary upward adjustment in population. Finally, in 1987, defendants were able to reduce the population to the rated single cell capacity of the prison, 656.

In 1988 defendants commenced a complete renovation of the prison. In

response to defendants' plans to double cell prisoners during renovations, plaintiffs moved to temporarily reduce the prison population within the walls to less than 656. The Court granted that motion over defendants' objection and defendants appealed. While that appeal was pending, defendants moved this Court to vacate the Decree on the same grounds contained in the present motion. The motion was denied for lack of jurisdiction. Defendants' appeal was thereafter terminated and they have now renewed their motion to vacate.

DISCUSSION

Defendants' primary contention is that the Consent Decree is void as a violation of the Eleventh Amendment because the relief embodied in it exceeds that which would have been constitutionally required to vindicate plaintiffs' Eighth Amendment rights. They rely primarily on Washington v. Penwell, 700

F.2d 570 (9th Cir. 1983), and Lelsz v. Kavanaugh, 807 F.2d 1243 (5th Cir. 1987), reh. denied, 815 F.2d 1034, cert. denied, 483 U.S. 1057 (1987).

In Penwell, the Ninth Circuit found an Eleventh Amendment violation in one provision of a consent decree because the provision required state officials to do more than the minimum necessary to conform to federal law. However, the Penwell decision predates the Supreme Court decision in Local No. 93 v. City of Cleveland, 478 U.S. 501, 525 (1986), which held that a consent decree may, in fact, provide more relief than a Court could have awarded after trial. Defendants argue that Local No. 93 is inapposite because the Eleventh Amendment was not implicated. However, both circuits which have considered the issue, have applied Local No. 93 in the context of the Eleventh Amendment. See Duran v. Carrothers, 885

F.2d 1485, 1487, n. 7 (10th Cir. 1989), cert. denied, ____ U.S. ____ (1990), and Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989).

Defendants' reliance on Lelsz v. Kavanaugh is also misplaced. In Lelsz, the state consented to provisions in a decree which were based solely on alleged violations of state law. Under Penhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), federal courts are proscribed from granting relief against state officials solely on the basis of their violations of state law. The instant litigation was based upon the Eighth Amendment, not state law.

There is no question that at all times this Court had subject matter jurisdiction over this dispute concerning the constitutionality of the conditions at WSR under the Eighth Amendment. The instant Consent Decree was entered to

resolve that litigation. Whether or not the Court might not have been able after trial to require single celling, the consent of the parties to that relief made it wholly appropriate. Local No. 93 v. City of Cleveland, supra.

Assuming, arguendo, that defendants' Eleventh Amendment argument has merit, it is clear that Eleventh Amendment immunity has been waived in this case. In 1981, after the terms of the Consent Decree had been agreed upon, but before formal entry of the Decree, the Washington legislature enacted the provision now codified as R.C.W. 72.02.180, Chapter 136, Section 108, Laws of 1981 (effective July 1, 1981). The pertinent section provides:

> It is the intent of the legislature that limitations be placed on the State Correctional Institution at Monroe.
>
> The following facilities at Monroe shall be subject to the inmate population limitations specified in this section.

. . .

> (3) The Washington State Reformatory population shall be as determined pursuant to federal court order.

R.C.W. 72.02.180 is the clearest, most explicit state statutory waiver of immunity the Court has ever seen.

Defendants' motion to vacate the Decree based on Eleventh Amendment immunity should be denied.

Defendants' alternative motion to vacate the Decree because it has been fully complied with should also be denied. Article II of the Decree provides:

> The parties stipulate to a continuation of this Court's jurisdiction . . . . Such jurisdiction will continue until such time as the agreement, on motion of either party or this Court, is deemed to be fully consummated. At the close of jurisdiction, orders will enter making a final judgment incorporating the terms herein . . .

As plaintiffs point out, the Decree quite plainly requires entry of a final judgment once all requirements of the

Decree are met. Once the remodeling, which prompted temporary modification of the Decree, is completed, it may well be appropriate to enter final judgment. At this time, however, with the temporary modification in effect, it would clearly be premature.

Defendants' alternative motions to dismiss because of full compliance, or to enter a final order at this time should be denied.

A proposed form of Order is attached.

DATED this 16th day of October, 1990.

s/
Philip K. Sweigert
United States Magistrate

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al.,	)	CASE NO. C-78-13R
	)	C-78-79R
Plaintiffs,	)	
	)	
vs.	)	ORDER
	)	
GERALD THOMPSON, et al.,	)	
	)	
Defendants.	)	
	)	

The Court, having considered defendants' motions to vacate the Consent Decree, the memoranda of the parties, the Report and Recommendation of United States Magistrate Philip K. Sweigert, and the balance of the records and files herein, does hereby find and ORDER:

(1) Said Report and Recommendation is approved and adopted;

(2) Defendants' motions to vacate the Consent Decree are DENIED; and,

(3) The Clerk is to direct copies of this Order to counsel of record and to Magistrate Sweigert.

DATED this ___ day of ____, 1990.

_____
Chief United States District Judge

FILED JAN. 6, 1994

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BISHOP COLLINS, MARIO VALDEZ; GARY TAYLOR; BILLY BELL; ROBERT HALSTIEN; DANIEL EVANS, AND RANDY REED, suing on behalf of themselves and all others similarly situated,	NO. 93-35245
Plaintiffs-Appellants,	D.C. No. CV-78-00013(V)R
v.	ORDER
GERALD THOMPSON, et al.,	
Defendants-Appellees.	

Before: WRIGHT, THOMPSON, and T.G. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Thompson and Nelson have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and

no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED**.

FILED AUGUST 17, 1981

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BISHOP COLLINS, et al.,	)	
Plaintiffs,	)	No. C-78-13 C-78-79V
vs.	)	CONSENT DECREE
GERALD THOMPSON, et al.,	)	
Defendants.	)	

COMES NOW, Gerald E. Thomas, Amos Reed, and Donald Look, defendants in C-78-79V, together with plaintiff class of inmates, by and through their respective attorneys, and stipulate to an order incorporating their negotiated settlement to this action. The parties maintain that this agreement constitutes a fair compromise of contentions and intend this to completely resolve, as between them,

all issues raised. Neither this agreement nor any order incorporating its terms in whole or in part shall be construed as an admission by any defendant as to legitimacy of any or all of plaintiffs' legal and factual contentions. Plaintiffs in this action maintain that conditions at the Washington State Reformatory (WSR) are not constitutional as being cruel and unusual punishment.

I.

PARTIES

Plaintiff class was certified on August 22, 1978. Class consists of all residents of WSR and all those who may reside there in the future.

For the purposes of this settlement, defendants are the Acting Secretary of the Washington State Department of Social and Health Services, the Director of the Adult Corrections Division of that Department, and the Superintendent of WSR.

II.

JURISDICTION

The parties stipulate to a continuation of this court's jurisdiction, and to the continued utilization of this court's Magistrate, for the purposes, and to the extent specified, below. Such jurisdiction will continue until such time as this agreement, on motion of either party or this court, is deemed to be fully consummated. At the close of jurisdiction, orders will enter making a final judgment incorporating the terms herein. Commitments made herein are binding on plaintiffs, defendants, defendants' successors, officers and agents.

III.

AGREEMENTS

A. Defendants agree as follows:

1. Defendants have prepared an adult correction master plan. One feature of such plan deals with strategies for a

systemwide population reduction. That section also explains the logic for those strategies. Portions relevant to the Reformatory are attached hereto and by this reference incorporated herein. Defendants accordingly agree to perform the plan, as per these specific goals for population reduction relative to population within the walls of the Reformatory:

DATE	POPULATION
April 1, 1981	865
July 1, 1981	850
October 1, 1981	790
December 1, 1981	735
July 1, 1983	656

"Within the Reformatory walls" excludes the honor farm, Reformatory work release facility, and the recently constructed 144 bed special offender center. Given the difficulty of making accurate predictions, exact guidelines are not useful for the

period between December 1, 1981 and July 1, 1983. Defendants will, however, gradually reduce population between those two times.

2. Defendants will cause to be done a study of inmate food preparation and food serving line areas within the Reformatory walls. Defendants will pay for this study and will select a person or persons to perform same. Unless agreed to by plaintiffs this person or those persons will not be in state employ on either a regular employee or consultant basis. Defendants will inform plaintiffs' attorneys of the person or persons selected. Plaintiffs' complaints regarding the credentials or potential bias of any selected person, to the extent not resolvable by the parties, may be aired at a hearing before this court. The study will review and report on management, food preparation, and food product. The study

will take place for at least two full days, though these days need not be consecutive. A written report will be turned in to attorneys for defendants and plaintiff class. The report will summarize the findings and, to the extent the person making the study finds improvements advisable, the study will make recommendations for such improvements and explain the need for and utility of each suggestion. This report will be given plaintiffs' attorneys within 90 days of final court approval of this settlement. Within 30 days defendant will supply plaintiff attorneys with a written reaction to recommendations for change, if any, in such study. This reaction will specify what recommendations will be accepted, and to what degree they will be effectuated. The reaction will also specify when such effectuation will be accomplished. Should plaintiffs express

dissatisfaction, and should defendants and plaintiffs be unable to work out a mutually satisfactory resolution, plaintiffs may air their complaints regarding defendants' reaction at a hearing before this court. Facts under review at such a hearing will be limited to those germane to the studied area and the study. The legal standard applicable at such review shall be whether the conditions under review constitute cruel and unusual punishment as prohibited by the Eighth Amendment to the United States Constitution.

3. Defendants will cause to be performed a study of the medical screening (triage) aspect of the health care delivery system at the Reformatory. This study will include an analysis of supervision of parties doing the screening by physicians or other medical personnel. Defendants will pay for the study and will

select a person or persons to perform same. Announcement of the selection of the person or persons to do the study, and the resolution of complaints thereabout, will be handled as with the study referred to above regarding food preparation. Defendants will permit the person or persons doing the study reasonable access so as to permit a competent performance of that study. The reporting, reacting, voluntary resolution and hearing processes for the medical study will be the same as for the food preparation study.

4. Defendants will not reduce the total level of program opportunities or treatment staff manpower. "Program opportunities" means vocational education, academic education, or jobs.

5. Defendants will not reduce the number of counselor positions at the Reformatory.

6. To the extent not already done, defendants will institute at the Reformatory the custody officer screening and training procedures which may be installed at Washington State Penitentiary as a feature of relief granted in the recent case of Hoptowit v. Ray, Eastern District Cause No. C-79-359.

7. Plaintiffs have not alleged in this case any employment of race as a criteria for defendants' selection of inmates for particular programming opportunities. Defendants do not employ race as a criteria in selecting inmates for programming opportunities and will continue not to use such criteria.

B. Plaintiffs agree as follows:

Plaintiffs will cooperate in defendants' efforts to properly administer the Reformatory, including the food and medical care service operations referred to above.

IV.

EFFECTUATION AND MODIFICATION

This agreement is self-effectuating.

Court review of defendants' medical triage system and kitchen operation may occur as specified above.

Where defendants are successful in showing to the court a sufficient change of facts with regard to agreement herein relative to population goals (topic III-A1), guard screening and training (topic III-A6), total program level (topic III-A4), or counselor positions (topic III-A5) and to agreements entered hereafter relative to defendants' response to recommendations made in studies on kitchen (topic III-A2) and hospital screening (topic III-A3), the court may order a modification in the terms of this agreement.

If, after such a showing, a major modification is permitted by the court, a

further hearing may be had at plaintiffs' election. The court shall decide what modification is major in each situation based upon the facts peculiar to the topic modified. The legal standard at such elected hearing shall be whether the conditions under review constitute cruel and unusual punishment as prohibited by the Eighth Amendment to the United States Constitution.

Until jurisdiction is terminated as referenced above, defendants will provide plaintiffs with bi-annual statements stating the average daily population for the last six months at the Reformatory.

As to plaintiffs' responsibility in paragraph III-B of this agreement, defendants may cause a hearing on allegations of failure by any or all members of plaintiffs' class to comply therewith. Alternatively, defendants may raise such allegations of noncompliance in

their defense at any other hearing provided for above.

V.

CLASS MEMBER CLAIMS REGARDING PERFORMANCE

Complaints by class members regarding defendants' performance of any of the conditions of this agreement may be addressed to Institutional Legal Services Project, 1702 Smith Tower, Seattle, Washington 98104.

DATED this 13th day of February, 1981.

KENNETH O. EIKENBERRY
Attorney General

s/
THOMAS W. HAYTON
Assistant Attorney General
Attorneys for Defendants

INSTITUTIONAL LEGAL SERVICES PROJECT

By:_____
JOHN H. HERTOG, JR.
ROBERT ADELMAN
Attorneys for Plaintiffs

After considering the above consent decree, being apprised of the arguments of counsel made at hearings dated January 19, 1981 and February 6, 1981, and being apprised of the contents of written reactions to the settlement as made by various class members pursuant to notice earlier approved, I recommend approval of this Consent Decree.

s/

PHILLIP SWEIGERT, MAGISTRATE

All legal and factual issues material to this action are accordingly resolved, court consideration as to specific issues being deferred as detailed above.

Dated as of August 15, 1981.

s/

DONALD VOORHEES
District Court Judge

(2)

Supreme Court, U.S.
FILED
MAY 4 1994
OFFICE OF THE CLERK

NO. 93-1561

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BISHOP COLLINS, et al., *Petitioners*,

v.

GERALD THOMPSON, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

KATHLEEN D. MIX
Chief Deputy Attorney General
Counsel of Record

JOHN SCOTT BLONIEN
Sr. Assistant Attorney General

PETER H. SMILEY
Assistant Attorney General

Attorney General's Office
Corrections Division
P. O. Box 40116
Olympia, Washington 98504-0116
(206) 586-1445

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that terms of the consent decree did not require a permanent population cap at the WSR, that the consent decree was "fully consummated" pursuant to its own terms, and that the decree should be vacated?

2. Did the Court of Appeals properly refuse to extend jurisdiction beyond the requirements of the consent decree in the absence of continuing constitutional violations?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

In 1981, Petitioners, a class of convicted male felons housed at the Washington State Reformatory (WSR), and Respondents, senior Washington prison officials, entered into a consent decree designed to improve the conditions of

confinement of that facility. Pursuant to the decree, Respondents studied and improved food preparation and service, medical screening, vocational and academic education, and job opportunities. *See* Petitioners' Appendix ("Petition App.") K. Petitioners do not dispute that Respondents met all of these terms.[1]

The consent decree also contained, as part of a "systemwide population reduction," a timetable for Respondents to "gradually reduce population between" April 1, 1981 and July 1, 1983 at WSR. Petition App. at K-3-5. The rate of reduction was based upon inmate population projections from 1981 until 1987. There was no provision in the decree for a permanent population cap or for setting population levels beyond July 1, 1983. Petition App. K.

Later, the district court extended the time period for complying with the population reduction schedule until 1987. The population was reduced to 656 inmates that year. Petition App. at A-3.

Finally, Article II ("JURISDICTION") of the consent decree provided for the termination of federal court supervision and jurisdiction:

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[1]In fact, Respondents have exceeded those requirements, voluntarily renovating and expanding the infrastructure, and improving safety and security measures, and recreational facilities at WSR. CR 623, 701-7.

> The parties stipulate to a continuation of this court's jurisdiction, and to the continued utilization of this court's Magistrate, for the purposes, and to the extent specified, below. Such *jurisdiction will continue until such time as this agreement*, on motion of either party, *is deemed fully consummated*. At the *close of jurisdiction*, orders will enter making a final judgment incorporating the terms herein. Commitments made herein are binding on plaintiffs, defendants, defendants' successors, officers, and agents.

Petition App. at K-3 (emphasis supplied). Article IV of the decree also anticipated that jurisdiction would eventually be "terminated". Petition App. at K-11.

Having "fully consummated" the decree, Respondents submitted their current (third) motion to vacate the decree to the United States District Court for the Western District of Washington, as provided for by Article II. CR 783-84; Petition App. at K-3, K-10-11. Petitioners argued that the district court should refuse to vacate the decree because 1) the decree required a permanent population cap and 2) Respondents would violate the decree in the future. The Petitioners thus requested perpetual supervision by the court. Petition App. at B-3-4.

In deciding Respondents' motion to vacate, Chief District Court Judge Rothstein examined the language of the decree and ruled that the decree required Respondents to "reduce the inmate population to 656", *not* to "maintai[n]" that population level.

Petition App. at B-2-3. Therefore, the decree was "fully consummated in 1987." *Id.*

As to Petitioners' second claim, the district court, reviewing considerable documentation concerning the conditions at WSR,[2] found that "there are no present violations of constitutional rights." Petition App. at B-5. Thus, "the court's continued intervention would be premised on the assumption that without judicial supervision, future violations will occur." *Id.*

The district court granted the motion to vacate and issued a final judgment dismissing the action, finding (1) the consent decree had been fully consummated, and (2) there was no other basis for jurisdiction. The court declined the invitation of Petitioners to impose a permanent population cap. Petition App. at B-8.

On appeal, Petitioners raised two issues:

> (1) whether the district court properly interpreted the consent decree and entered a final judgment "as contemplated by the parties," and (2) whether the district court should exercise continuing jurisdiction.

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[2]Respondents submitted a major study, "An Assessment of the Correctional Operations and Management of the Washington State Reformatory," by George Camp, an expert from the Criminal Justice Institute. Respondents also referenced other affidavits from previous litigation concerning the decree. Petitioners offered nothing.

Petition App. at A-5. The United States Court of Appeals for the Ninth Circuit addressed those two issues separately. Petition App. at A-5-9.

The Court of Appeals affirmed the district court, noting that under the "clear language of the decree," "the state was only required to reduce the inmate population to 656, not to maintain the population at that level." Petition App. at A-7.

The Court of Appeals, recognizing that Petitioners sought to maintain district court jurisdiction on an inactive basis in order to prevent future violations of constitutional rights, adopted Respondents' federalism arguments and refused "over-involvement" in the management of a state prison in the absence of any constitutional violations. Petition App. at A-9. Therefore, the Court of Appeals refused to extend the federal courts' supervision of WSR prison beyond the requirements of the decree.

The Petitioners request for en banc review of the panel's unanimous opinion was denied. Petition App. J.

This petition followed.

II. REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied for three reasons. First, Petitioners' argument for review is

premised upon a misinterpretation of the Court of Appeals' opinion. Second, the Court of Appeals' opinion is consistent with precedent and presents no conflict with other circuits. Third, in view of the specific facts of this case, the opinion below was correct.

A. The Petitioners Misrepresent The Opinion Below.

Petitioners' interpretation of the Court of Appeals' opinion is utterly untenable and misleading. Petitioners repeatedly claim that the Court of Appeals dissolved the decree *solely* because of the absence of ongoing constitutional violations at WSR. Petition at 10, 11, 12, 13, 14, 17-18 ("only" addressed constitutional issue), 19, 23-24, 26, 29, 30, 31-32 ("focussed obsessively" on the constitutional issues), 33-34, 40, 42 ("singular focus" on constitutional violations), 43. The Petitioners are incorrect.

Petitioners' interpretation of the Court of Appeals' opinion is clearly at odds with the opinion itself and the Petitioners' own arguments.[3] *See generally* Petition App. A. That court, like the district court before it, undertook two tasks in response to the issues framed by Petitioners.

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[3]Petitioners are internally inconsistent in their argument. They repeatedly assert throughout the Petition that the Court of Appeals relied "solely" or "obsessively" on the absence of Eighth Amendment violations, but later attempt to counter that court's interpretation of the decree. *See* Petition at 34-43.

First, the Court of Appeals addressed the issue of whether, according to the *terms* of the consent decree,[4] it should be vacated. Petition App. at A-5-7. The Court of Appeals looked at the rules borrowed from the appropriate Washington rules of contract interpretation, and examined the language of the decree. Petition App. at A-6-7. Contrary to Petitioners' repeated assertions, the Court of Appeals did *not* consider the lack of constitutional violations when it interpreted the language of the decree. Petition App. at A-6-7. The Court of Appeals found:

> We instructed the district court to *interpret the terms of the consent decree and enter a final judgment*. That court said that the only issue separating the parties was whether a final judgment should limit inmate population to 656. Because of the *clear language of the consent decree*, it found that the state was only required to reduce the inmate population to 656, not to maintain the population at that level. It also found that imposing a permanent population cap would require continuing jurisdiction and conflict with our clear order that jurisdiction end. *The district court properly examined the terms of the agreement and entered final judgment accordingly.*

Petition App. at A-6-7 (emphasis supplied).

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[4]The Court of Appeals made it clear that its interpretation of the decree was based on the terms of the decree. In fact, the heading for the discussion of the first issue was "The District Court Properly Entered Final Judgment Interpreting the Terms of the Decree As Ordered By This Court". Petition App. at A-6.

Only after determining that the decree was satisfied did the Court of Appeals decide if there was any other basis for continued jurisdiction over WSR, *i.e.*, the violation of constitutional rights. The lack of constitutional violations only played a role in the consideration of the second claim, not in interpreting the terms of the decree relative to its termination. *See* Petition App. at A-7-9. Only after interpreting the terms of the decree did the Court of Appeals affirm the district court's decision not to exercise federal jurisdiction over the state prison in the absence of constitutional violations.[5] Petition App. at A-7-9.

Petitioners also claim that the Court of Appeals "[i]nexplicably" focussed on the lack of Eighth Amendment violations in previous orders concerning limited remand. Petition at 29. Petitioners argue that the Court of Appeals required the district court to interpret the decree in light of *Toussaint v. McCarthy*, 926 F.2d 800 (9th Cir. 1990), *cert.*

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[5]In a previous case where no consent decree existed to require injunctive relief, *Toussaint v. McCarthy*, 926 F.2d 800, 802 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 213 (1991), the Court of Appeals refused to continue court-supervised monitoring of a prison absent substantial evidence of continuing constitutional violations. Therefore, after finding no consent decree requirement for a permanent population cap or evidence of constitutional violations at WSR, the Court of Appeals followed *Toussaint*, refusing to further interfere with the operations of the state prison officials. Petition App. at A-8-9.

denied, 112 S. Ct. 213 (1991),[6] "presumably" for the proposition that jurisdiction should end when there are no constitutional violations. Petition at 29-30.

Actually, the record reveals quite the opposite. The first inquiry the Court of Appeals ordered on remand was "Whether the consent decree has been 'fully consummated' within the terms of the Article II thereof." Petition App. at F-1. The Court of Appeals ordered the district court to consider *Toussaint* only in the *second* inquiry, when the district court considered the appropriateness and contents of final judgment.[7]

Petitioners have constructed a "straw man". They attribute the Court of Appeals' decision on the first issue (vacating the decree) to the court's rationale for deciding the second issue (the absence of constitutional violations). However, the readily ascertainable language and reasoning of the Court of Appeals indicates that both lower courts found the decree "fully consummated" according to the *terms* of the decree, and resolved

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[6]*See infra* note 5.

[7]Final judgment was *only* appropriate if the decree was satisfied by its own terms:

> In complying with the mandate of this limited remand,the district court may take such evidence and hold such hearings as it deems appropriate. In the event the district court determines the consent decree is fully consummated, it shall enter the final judgment found appropriate under paragraph (2) hereof.

Petition App. at G-3.

the first issue based upon Respondents' fulfillment of their obligations under the decree, *not* the lack of constitutional violations. Petition App. at A-6-7. By confusing the two issues, Petitioners misrepresent the reasoning of the courts below,[8] creating the illusion of conflict with precedent.

Petitioners have not accurately presented the opinion of the court below. The Court of Appeals' decision presents no "special and important reasons" for granting the writ of certiorari. Sup. Ct. R. 10.1. Petitioners would have this Court expend its limited time reviewing reasoning never exercised below, settling a non-existent dispute. This Court has long refrained from deciding questions that are not before it, and should not make an exception here.

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[8]Petitioners also repeatedly mischaracterize Respondents' arguments below. While Respondents have argued, and continue to maintain, that jurisdiction is generally improper where no constitutional violation occurred, Respondents agree that a consent decree may confer jurisdiction even without a finding of constitutional violations. Respondents argued and proved to the courts below that no constitutional violations existed *and* that they had satisfied the terms of the consent decree itself.

Petitioners assert the Respondents' "entire appeal" in 1991 was premised on the claim that the decree must be vacated if there were no constitutional violations at WSR. However, an examination of the Respondents' brief itself reveals the Respondents' primary argument was that "under the terms of the decree the parties' agreement has been fully consummated and the decree should be dissolved." Brief at 10-23. The secondary and tertiary arguments addressed equitable and the Eleventh Amendment arguments, respectively.

Petitioners' other distortions of Respondents' arguments and the district courts' opinions, are too numerous to mention in any particularized fashion. Those arguments and opinions are not properly a subject of review by this Court, and need not be addressed further.

B. The Court Of Appeals' Opinion Is Consistent With Other Circuits', Its Own, And This Court's Precedents.

Petitioners argue that this Court should grant a writ of certiorari because the opinion below allegedly conflicts with the prior decisions of this Court, the other circuits, and the Ninth Circuit itself. Petition at 11-43. However, the opinion below mirrored the decisions of the Court of Appeals for the Ninth Circuit and other circuits, and is consistent with the precedents of this Court.

1. There is no intracircuit conflict.

The Court of Appeals' decision is consistent with its own precedent. Petitioners argue that the Court of Appeals' decision is inconsistent with and ignored *Stone v. City and County of San Francisco*, 968 F.2d 850, 862 n. 20 (9th Cir. 1992). Petition at 26.

Stone held that consent decrees are enforceable even without constitutional violations. Nothing in the opinion below contradicts *Stone*. In fact, the district court and Court of Appeals permitted and enforced the consent decree for roughly 12 years without finding constitutional violations. The district court dissolved the decree five years after by its own terms it was "fully consummated." As noted above, the district court entered final judgment for Respondents and terminated its supervision only when the terms of the decree required. It was

only then that the appeals court ventured to determine if there were constitutional violations; after having found none, there was no basis for jurisdiction.[9]

2. There is no intercircuit conflict.

Petitioners claim the case "most similar in fact and posture" to the present is *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286 (1st Cir. 1993). Petition at 14. In *Rufo*, the Commissioner sought to vacate a consent decree based solely upon the fact that the jail was in compliance with constitutional requirements. Here, the Respondents achieved full compliance

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[9]Petitioners also criticize the Court of Appeals' decision in *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), apparently because it was written by the author of the opinion below. Petition at 25, 25 n. 6. Once again, Petitioners distort precedent when they claim the *Penwell* court found the decree unenforceable because it exceeded constitutional minima. In reality, the Court of Appeals held that under the appropriate Oregon rules of contract interpretation the decree was invalid because the state officials who were defendants lacked authority under the *Oregon* (not federal) constitution to enter into the decree. As the defendants had acted *ultra vires*, Oregon was not bound by the decree under the Oregon rules of contract interpretation. *Penwell*, 700 F.2d at 573. Because no valid consent decree existed, the federal courts were prohibited from exercising jurisdiction over the Oregon prison in the absence of constitutional violations. *Id.* at 573-75.

Penwell is quite similar to the present case. The primary difference is that the *Penwell* consent decree was a nullity *ab initio* while the consent decree in the present action was dissolved after it was fully consummated under its own terms. Once the courts determine that a consent decree has either been satisfied or does not exist, they determine whether any constitutional issues exist which would require them to maintain jurisdiction in the absence of a current, valid consent decree. *See* Petition App. at A-3-9, B-2-3, E-3; *Penwell*, 700 F.2d at 573-75; *Inmates of Suffolk County Jail*, 12 F.3d at 292 (describing the two-part test under this Court's decisions in *Dowell* and *Freeman*).

with the terms of the consent decree, and moved for its vacation as provided for by its terms.[10]

While dissimilar in fact and posture, *Inmates of Suffolk County Jail* is instructive in its reasoning. In *Inmates of Suffolk County Jail*, the United States Court of Appeals for the First Circuit interpreted *Board of Education v. Dowell*, 498 U.S. 237 (1991), and *Freeman v. Pitts*, ___ U.S. ___, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992), to state the requirements for terminating a litigated decree and returning an institution to the governance of state or local authorities:

> First, the district court must determine that the underlying constitutional wrong has been remedied, either fully or to the full extent now deemed practicable. *See Dowell*, 398 U.S. at 247, 249-50, 111 S.Ct. at 636, 637-38; *Glover*, 989 F.2d at 69. Second, there must be a determination that the authorities have complied with the decree in good faith for a reasonable period of time since it was entered. *See Freeman*, ___ U.S. ___, 112 S.Ct. at 1446; *Dowell*, 498 U.S. at 249-50, 111 S.Ct. at 637-38.

Inmates of Suffolk County Jail, 12 F.3d at 292.

In the present case, the courts below addressed both requirements, though in reverse order. First, they found that Respondents had complied with the terms of the consent decree,

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[10]The *Petitioners* raised the issue of continuing jurisdiction on non-decree grounds: the alleged danger of future constitutional violations. Petition App. at A-5.

which was "fully consummated". This satisfies the second requirement of *Inmates of Suffolk County Jail*.[11] Then, after Petitioners sought continued jurisdiction on the grounds that Respondents might, in the future, violate their constitutional rights, the courts below found that no such violations had occurred. Thus, Respondents met the first requirement of *Inmates of Suffolk County Jail*. Far from conflicting with the First Circuit's decisions, the Ninth Circuit's decision in the present case mirrors the reasoning of the First Circuit.

Petitioners also argue that the opinion below is inconsistent with the decisions of the D.C. Circuit, the Second Circuit, the Fourth Circuit, the Seventh Circuit, and the Tenth Circuit of the U.S. Court of Appeals. Petition at 19-24. The cases cited by Petitioners generally hold that the true measure of compliance with a consent decree is whether the parties have complied with the terms of the decree, not whether the underlying rights have been vindicated.

Here both lower courts agreed with and abided by the reasoning of the decisions of the above circuits. Respondents have satisfied the terms of the decree. Petition App. A, B. As

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[11]The decree in the present matter established its own requirements for termination. The decree had to be "fully consummated", not just complied with in good faith for a reasonable period. Thus, Respondents' full compliance with the decree, as modified to allow additional time, satisfied and exceeded the second requirement of *Inmates of Suffolk County Jail*.

a result, the courts found it "fully consummated" under the "plain language" of the decree, *not* under the Eighth Amendment. The fact that Respondents *also* complied with the Eighth Amendment suggests only that there would be no *other* basis for exercising jurisdiction.

One of the cases cited by Petitioners offers additional support for the Court of Appeals' decision. In *Twelve John Does v. District of Columbia*, 861 F.2d 295, 301 (D.C. Cir. 1988), the D.C. Circuit cited *Firefighters Local 1784 v. Stotts*, 467 U.S. 561, 574-75 (1984) for the proposition that courts "may not expand relief beyond the scope of a consent decree, even if the relief would further the purposes of the decree."

To accept Petitioners' invitation to grant relief beyond the decree, which required only a temporary reduction of the inmate population, would create a conflict where one doesn't presently exist. Petitioners' arguments that their interests would be served by an exercise of jurisdiction beyond that required by the decree are clearly irrelevant under *Local 1784*. In the present action, both lower courts refused to exercise jurisdiction beyond that required by the decree. No intercircuit conflict exists to justify a grant of the writ of certiorari.

3. The Court of Appeals' decision is consistent with this Court's precedents.

Petitioners claim the decision below is inconsistent with this Court's precedents. Petition at 29-34. Petitioners refer to *Rufo v. Inmates of Suffolk County Jail*, ___ U.S. ___, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) and *Local 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986) for the rule that consent decrees can require more than the Constitution mandates. Petition at 29. The Court of Appeals never disagreed with that rule. In fact, the consent decree was enforced for twelve years without any finding of constitutional violations which would normally be necessary for federal jurisdiction. Neither *Rufo* nor *Local 93* are relevant because here the lower courts never held that the absence of constitutional violations invalidated the decree. Petitioners' misinterpretation of the decision below created the illusion of a conflict, as the lower courts did not invalidate the decree based upon the absence of constitutional violations.[12] Instead, both courts 1) found the decree "fully consummated",

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[12]Petitioners attempt to construe Respondents' arguments below and the decisions below together in order to claim the consent decree was decided "solely" on Petitioners' failure to point to constitutional violations. Petition at 32-33. They do so by underlining a passage from the state's motion to vacate the decree, and ignoring the rest of the quotation. Petition at 32. They claim Respondents' argument "seems" to be that once constitutional violations are cured, a federal court loses jurisdiction over the decree, contrary to *Rufo*. Petition at 32-33. In reality, Respondents' argument was, and remains, that courts should vacate consent decrees when they are "fully consummated" by their own terms. The absence of Eighth Amendment violations prevented the district court from exercising jurisdiction over the state prison after the decree was consummated, but it did *not* invalidate the decree.

and 2) refused to grant any relief beyond that contemplated by the decree based upon the lack of constitutional violations and federalism concerns. Petition App. at A-1-9, B-1-18.

Petitioners' claims of intercircuit conflict, intracircuit conflict, and conflict with this Court's previous decisions are based entirely on their misrepresentation of the opinions below. The Court of Appeals' actual decision is entirely consistent with precedent. Therefore, no conflict exists which could warrant a grant of the writ. Sup. Ct. R. 10.1(a).

C. Both Lower Courts Properly Ruled In The Respondents' Favor.

1. By its own terms, the decree was fully consummated and required dissolution.

When interpreting the terms of a consent decree, a federal court applies general contract principles using the law of the state where the agreement was made. *Collins v. Thompson*, 679 F.2d 168, 170 (9th Cir. 1982); *see also United States v. ITT Continental Baking Company*, 420 U.S. 223, 236-37 (1975). Washington follows the context rule or objective manifestation theory of contracts, which imputes to the parties a reasonable meaning of their words and acts. *Berg v. Hudesman*, 801 P.2d 222, 229 (Wash. 1990); *Siekawitch v. Washington Beef Products*, 58 Wn. App. 454, 461, 793 P.2d 994 (1990). Therefore, the Court of Appeals was required to consider the

entire circumstances under which the decree was made, as an aid in ascertaining the parties' intent. *Berg*, 801 P.2d at 229.

The only dispute concerning the decree was whether it required a "permanent population cap," a phrase that is entirely absent from the decree. The courts below both found the "clear language of the consent decree" required Respondents only to "reduce", and not to maintain, the inmate population at WSR to 656 inmates.

Petitioners use a secondary definition of "reduction" to argue the word "reduce" really means "maintain." Petition at 40-41. However, the decree itself provides a timetable; reduction would occur "between" 1981 and 1983,[13] and therefore suggests that the primary definition ("act of reducing") is the appropriate meaning of the term.

The terms within the "four corners" of the decree support the lower courts' findings. Article II specifically indicated that jurisdiction would terminate when the decree was "fully consummated." Petition App. at K-3. A decree existing in perpetuity could never be "fully consummated." The decree anticipates a "close of jurisdiction," and a time when "jurisdiction is terminated." This provision is inconsistent with

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[13]While later modified to extend the time period, the "reduction" was to occur "between those two times," December 1, 1981 and July 1, 1983. Petition App. at K-5.

Petitioners' request that the district court maintain jurisdiction indefinitely to prevent future constitutional violations. A court does not close jurisdiction by entering a permanent injunction. *See, e.g., System Federation No. 91 v. Wright*, 364 U.S. 642 (1961); *Nicacio v. United States I.N.S.*, 797 F.2d 700, 706 (9th Cir. 1985) (a court which enters an injunction retains jurisdiction).

Petitioners argue that the "final judgment incorporating the terms" of the decree must require a population cap. However, as they also point out, this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) indicated that consent decree terms should generally not be implied, for it is "more reasonable to believe that there would have been an express provision to that effect." This Court has also emphasized that the interpretation of consent decrees should focus upon the written language of the decree. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

If the parties had agreed to a permanent population cap, they would have provided for one. Instead, they wrote that Respondents would "reduce" the population "between those times", followed by a "close of jurisdiction." The final judgment did incorporate the terms of the decree, indicating that Respondents had reduced the population and otherwise satisfied the decree. There is no provision for a permanent cap, no

mention of maintaining the level beyond 1983, and no mention of a permanent injunction within the terms of the decree.

The context in which the consent decree was signed also supports the lower courts' opinions. The decree was based upon projections of inmate population extending to 1987. Even though the decree was replete with studies concerning the other subjects of the decree, there was no provision calling for continued study of population beyond 1983 or 1987. It is unreasonable to assert that the parties mutually intended to reduce the population indefinitely in the absence of any agreed language or data to support such a plan. Prisons may be renovated, expanded, or demolished. A permanent cap was inherently unworkable in light of a fluctuating inmate population and changing needs of the prison system. Respondents never intended to agree to permanent federal supervision of the state prison, and the decree does not require it.[14]

2. Once the decree was fully consummated, the lower courts properly declined to exercise jurisdiction in the absence of constitutional violations.

Federal courts are courts of limited jurisdiction. U.S. Const. art. III. The Eleventh Amendment affirmed the

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[14]Petitioners claim that Respondents never interpreted the language "in the way the lower courts did" until recently, based upon a June 1988 statement of Respondents' counsel. Petition at 41 n. 11. However, the statement only indicates that "the current consent order" limited the population to 656 and never mentions the prospects of a future order or permanent cap.

fundamental principle of sovereign immunity and further restrained federal jurisdiction where, as here, the real party in interest is a sovereign state, *Pennhurst v. Halderman*, 465 U.S. 89, 98, 101 (1984); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

Prison administration is a responsibility properly entrusted to the legislative and executive branches of government, "and separation of power concerns counsel a policy of judicial restraint", particularly where a state penal system is involved. *Turner v. Safely*, 482 U.S. 78, 85 (1987); *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) ("where state penal institutions are involved, federal courts have further reason for deference to the appropriate prison authorities.")

Petitioners' plea for perpetual federal court jurisdiction based upon their assertion of a danger of future constitutional violations was unfounded in both law and fact. The lower courts found no constitutional violations at WSR, and Respondents have renovated the facility, exceeding the requirements of both the decree and the Eighth Amendment. The Petitioners failed to demonstrate such any real or immediate danger of constitutional violations, and there is no danger of irreparable injury. If future constitutional violations occur, the Petitioners may seek relief in law or equity. The Petitioners were not entitled to equitable relief. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

The lower courts properly refused to exercise their limited jurisdiction to interfere with prison officials beyond the consent decree. *See* Welling and Jones, *Prison Reform Issues for the Eighties: Modification and Dissolution of Injunctions*[15] *in the Federal Courts*, 20 Conn. L. Rev. 865, 892 (1988) (once the requirements for dissolution have been met, "the federal court's involvement in the state's business is overintrusive and disrupts the balance of federalism.") Dissolution "leaves defendants with the duty to comply with the law and no more and leaves to the defendants the choice of how to achieve that compliance." *Id.* at 884.

Respondents satisfied the requirements of both the Constitution *and* the consent decree. Accordingly, the lower courts properly allowed state prison officials to return to the task of running the Washington State Reformatory.

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[15]The authors' references to injunctions includes both litigated and consensual decrees. *Id.* at 885.

III. CONCLUSION

The decisions below are in complete accord with the decisions of this and other federal courts. This case was decided upon the unique terms of a single consent decree under the appropriate Washington State rules of contract interpretation. The federalism question was properly resolved in light of this Court's precedents and admonitions that state prison officials, not federal judges, should administer state prisons. The law in this area is well-settled, and was properly followed by the Court of Appeals. This case is neither "special" nor "important," and the correct decision below requires none of this Court's limited time. Sup. Ct. R. 10.1.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

KATHLEEN D. MIX
Chief Deputy Attorney General
Counsel of Record
WSBA #07453

JOHN SCOTT BLONIEN
Sr. Assistant Attorney General
WSBA #11344

PETER H. SMILEY
Assistant Attorney General
WSBA #23047

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No. 93-1561

In The

Supreme Court of the United States

October Term, 1993

BISHOP COLLINS, et al.,

Petitioners,

vs.

GERALD THOMPSON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

ROBERT A. STALKER, JR.
EVERGREEN LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-5933

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondents, in their brief in opposition, attempt to divert the Court's attention from the important question presented by this petition: What are the appropriate standards for a court to apply when considering a motion to dissolve a consent decree? Instead, respondents claim that the courts below only interpreted the consent decree and then, after dissolving it, terminated continuing jurisdiction in this case. Brief in Opposition at 11-12. That, however, is not what happened below.

When respondents accuse petitioners of misrepresenting the Ninth Circuit opinion, Brief in Opposition at 6, they are asking this Court to read the most recent panel opinion narrowly and literally and to ignore the other related orders that panel issued in this case. All the panel's orders, though, must be considered together to understand what the Ninth Circuit actually did. One cannot isolate the panel's final opinion from its other orders, as respondents do, without misinterpreting both the actions and the reasoning of the panel.

The Ninth Circuit never carefully examined the operative consent decree language. Therefore, respondents are mistaken when they assert that this is a case that involves only construction of a decree. And, since the courts below concluded that the decree must be vacated, contrary to the express language in the decree, the Ninth Circuit, as we have shown, must have acted under Fed. R. Civ. P. 60(b), even though the Circuit never referred to the rules governing vacating decrees or injunctions. Finally, since the Ninth Circuit panel consistently focussed on the question of constitutional conditions at the prison in each of their several orders, one must conclude that, indeed, this particular panel approved the dissolution of the decree

solely because of the purported absence of constitutional violations at the prison.

The latest Ninth Circuit opinion is internally inconsistent, further adding to the confusion in this case. The panel said it "instructed the district court to interpret the terms of the consent decree and enter a final judgment." Petition App. at A-6. Yet in the same paragraph, the panel referred to its earlier "clear order that jurisdiction end." *Id.* at A-7. The Ninth Circuit and the respondents cannot have it both ways: The lower courts could either interpret the decree, which, as discussed below, requires a final judgment incorporating the terms of the decree, including the population cap, or they could end jurisdiction under Rule 60(b) regardless of the decree's requirements. Since the Ninth Circuit ultimately approved the vacating of the decree, "because there are no ongoing constitutional violations at the reformatory," *id.* at A-2, the conclusion petitioners drew was logical, not misleading. To argue that this case merely involves interpretation of a consent decree truly misrepresents the Ninth Circuit's series of orders in this case.

I. The Court Below Terminated The Consent Decree Solely Because The Petitioners Did Not Prove Ongoing Constitutional Violations At The Prison.

Respondents claim that the lower courts engaged in a distinct, two part inquiry, first interpreting the consent decree and only secondarily considering the constitutional question. Brief in Opposition at 11-12. That claim is false. The Ninth Circuit consistently interwove the decree interpretation question with its concerns about constitutional violations in order after order. *See e.g.*, Petition App. F-2, G-2-3, D-8.

The two orders of limited remand (*id.* at F-1 - G-4) and the district court's ultimate response to those orders clearly show how far away from accepted principles of consent decree construction the courts below departed. The Court of Appeals instructed the district court to determine the language of the final judgment required by the decree "specifically considering the case of *Toussaint v. McCarthy*, [926 F.2d 800] (9th Cir. 1991). [*cert. denied*, 112 S.Ct. 213 (1991)]." Petition App. at F-2, G-3. *Toussaint*, though, did not involve interpretation of a decree. In essence, the *Toussaint* court held that relief should not be imposed in a case where there were no constitutional violations.

The district court here construed the panel's directives to require vacating the decree since, "as in *Toussaint*, there are no present violations of constitutional rights." Petition App. at B-5. The courts below thus linked even *interpretation* of the decree with a finding of constitutional violations. There is no precedent for such linkage. The language of the final judgment here must be determined by interpreting the language of the parties' agreement, *United States v. Armour & Co.*, 402 U.S. 673, 681-2 (1971), not through consideration of constitutional compliance at the prison.

The district court, in response to the Ninth Circuit orders, did not rigorously analyze the consent decree language. Nor did it utilize, in any manner whatsoever, accepted principles of consent decree construction. The district court instead interpreted the Ninth Circuit orders to convey a "clear message" to "terminate its involvement in this matter." Petition App. at B-8. Such a "message" was not based on interpretation of the decree; it depended entirely on the panel's hostility toward both

the decree as written and the district court's involvement in the case that, in the panel's view, went beyond mere preservation of constitutional rights. *Id.* at B-6.

The Ninth Circuit panel affirmed, without analysis, the district court's interpretation. The panel, however, could not have independently interpreted the decree since it too paid almost no attention to the language the parties chose when settling the case, contrary to *Armour*. While the Ninth Circuit listed three cases concerning consent decree interpretation, it did not apply any principles from those cases to analyze the actual language of the decree.

In short, the lower courts ignored the language of the consent decree to reach a result the parties never intended. This result was not based on any sort of interpretation of the decree. It occurred because the prisoners did not show any ongoing constitutional violations at the prison. This was the major error that, if left unrectified, will distort the law of consent decrees.

II. The Parties Intended To Permanently Cap The Population Of The Prison.

Respondents state, "If the parties had agreed to a permanent population cap, they would have provided for one." Brief in Opposition at 19. That is exactly what the parties intended to do when they chose the language requiring entry of a final judgment "*incorporating the terms*" of the decree, including the population reduction, upon completion of the requirements of the decree. Petition App. at K-3 (emphasis added). As the petitioners' lawyer who negotiated the decree explained, "it was plaintiffs' intent to secure an order which would permanently bar double-celling at the WSR." CR 771, Exhibit B.

While the language in Article II certainly might have been more carefully crafted, it cannot be read to require the dissolution of the decree upon "full consummation" as respondents now argue.[1]

The interpretation adopted by the lower courts and urged by the respondents bears little relationship to the actual language in the decree. Neither does it reflect the parties' understanding when they settled the case. Respondents' claim that the decree "required only a temporary reduction of the inmate population", Brief in Opposition at 15, is absurd. That interpretation would mean that the prisoners agreed to settle this case, which challenged nearly all aspects of prison life, for nothing more than a gradual population reduction that was to occur over a two year period.[2] Under respondents' interpretation, the state would be free to place thousands of prisoners in the 656 cells at WSR the day after it had completed the population reduction.

Petitioners and their counsel never would have been so foolish as to agree to a "temporary" settlement. Indeed, the district court could not have permitted such a settlement to enter, given its responsibilities to absent class members under Fed. R. Civ. P. 23(e). *See Grunin v.*

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[1] As shown in the petition at 41 n.11, respondents' argument about the meaning of Article II was not made until years after the decree was fully consummated. In 1989, when they brought their first motion to vacate the decree, respondents filed not under Article II but under Article IV, the *modification* section of the decree, asking that the decree be modified to "provide for its termination." CR 672 at 2.

[2] The decree provisions that were not related to the population reduction required only studies, not substantive changes at the prison.

International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). It is significant that the Magistrate Judge, who recommended entry of the original decree in 1981 and who heard the parties' contemporary representations as to the meaning of the decree, rejected respondents' interpretation and recommended in 1992 a permanent injunction capping the population at 656. Petition App. at C-11.

Although their argument is not clear, respondents seem to claim that the language in Article II of the consent decree referring to "the close of jurisdiction" requires vacating the decree once it has been fully consummated. Brief in Opposition at 18-19. This argument, however, can be sustained only if the Court disregards, as did the lower courts, the remaining language in Article II requiring entry of a final judgment incorporating the terms of the decree when jurisdiction closes.

More importantly, respondents' argument runs contrary to the holding in *Board of Education v. Dowell*, 498 U.S. 237 (1991), where this Court specifically acknowledged that the termination or close of jurisdiction in an injunctive case does not dissolve the decree. The *Dowell* Court considered a 1977 district court order that stated, in part, "Jurisdiction in this case is terminated . . . " *Id.* at 242. This Court held that "the 1977 order did not dissolve the desegregation decree . . . " *Id.* at 244. Thus, there is obviously a difference between the "close of jurisdiction" and the dissolution of the decree. The language used by the parties in the decree now before the Court, as with the *Dowell* order, does not require the court to dismiss the case once the decree's obligations have been met. To the

contrary, a final judgment incorporating those obligations is required.[3]

III. Respondents Have Not Met Any Of The Established Tests For Vacating A Consent Decree.

Since the courts below did not interpret the decree as it was written, those courts could properly have vacated or dissolved the decree only under Fed. R. Civ. P. 60(b). Yet there was no mention below of Rule 60(b) or the 60(b) standards defined by this Court in *Rufo v. Inmates of Suffolk County Jail*, ___ U.S. ___, 112 S.Ct. 748 (1992), or even the less demanding standards for vacating a litigated school desegregation injunction outlined in *Board of Education v. Dowell*. Rather, the courts below decided that the current absence of proven constitutional violations at WSR was sufficient to dissolve the decree.

Respondents several times repeat the distortion of petitioners' argument as mischaracterized by the Ninth Circuit.[4] Never have petitioners argued that the courts should exercise continuing jurisdiction "beyond that

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[3] Besides *Dowell*, other courts have agreed that courts can terminate jurisdiction over consent decrees without dissolving or vacating the decree. *Consumer Advisory Board v. Glover*, 989 F.2d 65 (1st Cir. 1993); *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991); *See generally* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. Miami L.Rev. 401 (1987); *See also Brewster v. Dukakis*, 3 F.3d 488, 490-91 (1st Cir. 1993).

[4] The two questions presented to the Ninth Circuit for review by petitioners in the most recent appeal were not as the Ninth Circuit and respondents claim. Petitioners asked:

> 1. When construing a consent decree that expressly requires entry of a final judgment incorporating the terms of the decree upon full consummation of the

required by the decree." Brief in Opposition at 15. Petitioners instead argued in their reply brief in the Ninth Circuit that inactive jurisdiction should be continued in this matter, as the parties agreed, since respondents could not meet even the least demanding test for dissolution of a decree, a test later described by the First Circuit in *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286 (1st Cir. 1993). Respondents do not meet this test because they cannot show that "it is unlikely that the original violations will soon be resumed if the decree were discontinued." *Suffolk County Jail*, 12 F.3d at 293. Precisely because respondents are likely to "return to [their] former ways," *Dowell*, 498 U.S. at 247, they have not met this minimal test for dissolving the consent decree. A conflict in the circuits thus does exist, warranting review by this Court.

IV. The Respondents Have Consistently Urged, And the Ninth Circuit Implicitly Agreed, That Consent Decrees That Require More Than Does The Constitution Are Not Enforceable.

Respondents attempt to minimize the conflict among the circuits and the unique holding in this case. They now

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requirements of the decree, did the district court err by entering a final judgment that vacated the decree?
2. When the parties entered the consent decree that settled this case, did they intend to cap the population at the Washington State Reformatory?

Ninth Circuit No. 93-35245, Brief of Appellants at 1. Nothing was said about continuing jurisdiction after the decree was vacated. When the Court of Appeals vacated the decree based on the absence of constitutional violations, the petitioners argued, in their petition for rehearing, that such a basis was improper.

claim that both respondents and the Ninth Circuit panel agree that consent decrees can require more than the Constitution mandates. Brief in Opposition at 10 n.8, 16. It is difficult to understand how respondents' current acceptance of this well-established rule is consistent with their arguments in earlier phases of this case where they claimed: "[T]he Defendants seek relief from the Decree on the ground that the district court lacks subject matter jurisdiction under the Eleventh Amendment to enforce remedies which exceed those necessary to cure an alleged Eighth Amendment violation." Brief of Appellants in Ninth Circuit No. 91-35056 at 10. Lest there be any doubt, respondents continued: "Regardless of the construction of the decree, the district court should not be permitted to enforce a continuing injunction mandating single-celling at WSR absent an Eighth Amendment violation caused by population levels." *Id.* at 23-24. Even in their most recent brief in the Ninth Circuit, respondents continued to argue, contrary to their concession in this Court, that "[t]he Eleventh Amendment barred the district court from continuing to enforce a consent decree in the absence of a constitutional violation." Brief of Appellees in Ninth Circuit No. 93-35345 at 18. Respondents clearly do *not* agree that this consent decree, which may in fact require more than does the Constitution, is valid.

Similarly, though less blatantly, the Ninth Circuit panel also appeared to disagree with the *Rufo* holding (and the uniform results in all other circuits that have examined the question) approving consent decrees that require more than does the Constitution. The panel's error, once again, is apparent when one examines all the orders the panel has issued. In its first order of limited remand, for example, the panel specifically required a

constitutional evaluation, Petition App. F-2, even though the appeal concerned only interpretation of and a motion to vacate a consent decree. Further, as discussed above, in that order and in the amended order of limited remand, Petition App. G, the panel ordered the district court to interpret the decree in light of *Toussaint v. McCarthy*, a case that linked federal court authority with a finding of a constitutional violation. In its memorandum of remand, Petition App. at D-8, the panel suggested that, despite this consent decree, "judicial intervention" was appropriate only "to preserve constitutional rights."

Respondents now disingenuously try to convince this Court that this case does not present the question whether constitutional compliance, without more, is sufficient to justify dissolution of a consent decree. This Court should not be misled by the confused and confusing opinion of the Ninth Circuit or the erroneous claims of respondents. Because the Ninth Circuit so far strayed from accepted practices when it vacated the consent decree, the writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. STALKER, JR.
WSBA No. 13650
Counsel of Record for Petitioners
EVERGREEN LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-5933